

*Commission of Inquiry*  
*Into the Wrongful*  
*Conviction of David Milgaard*  
*before*  
**THE HONOURABLE MR. JUSTICE**  
**EDWARD P. MacCALLUM**

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Transcript of Proceedings

and

Testimony before the Commission  
sitting at the  
Radisson Hotel at  
Saskatoon, Saskatchewan

\*\*\*\*\*

On Tuesday, June 7th, 2005

Volume 49

Inquiry Proceedings



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1 Transcript of Proceedings

2 (Reconvened at 9:00 a.m.)

3 COMMISSIONER MacCALLUM: Good morning.

4 JOSEPH PENKALA, continued:

09:03 5 BY MR. HODSON:

6 Q Good morning, Mr. Penkala.

7 A Good morning.

8 Q If I could call up 047947, please. Do you recall  
9 yesterday when we finished for the day I had gone  
09:03 10 through this document and it was a letter from  
11 Chief of Police John Gibbon, chief at the time, to  
12 Mr. Gary Young who was counsel for the Milgaard  
13 family and it dealt with the police files. You  
14 recall us going through that?

09:03 15 A Yes.

16 Q And as well I had shown you a letter previous  
17 where they were also requesting an opportunity to  
18 interview witnesses. You recall us touching on  
19 that?

09:03 20 A Yes.

21 Q And if I could call up 059610, please, and this  
22 appears to be a memorandum from you following  
23 closely on this letter, January 13th, you can't  
24 see it there, but it's 1981, to Superintendent  
09:04 25 Ferguson and you are asking that Staff Sergeant



1 Karst check out Wilson, John and Cadrain and get  
2 some addresses. Do you recall doing that, Mr.  
3 Penkala?

4 A Yes.

09:04 5 Q And would this be a case of following up on the  
6 request from the Milgaard lawyers to interview  
7 these people?

8 A I think it was on the instructions of Chief  
9 Gibbon.

09:04 10 Q Okay. And then if we can go ahead --

11 A Excuse me.

12 Q Oh, I'm sorry. And so what the memo says, if  
13 addresses are available make them known, and then  
14 if we could call up 106839 and this is a letter,  
09:04 15 January 16th, 1981, from Mr. Karst to Mr. Gibbon  
16 saying that he's contacted Cadrain who requested  
17 his whereabouts not be divulged to anyone with  
18 regard to this matter and then as well that Karst  
19 contacted Inspector Walters and has addresses for  
09:05 20 Wilson and John, and then if you could just scroll  
21 down to the bottom, please, and it appears to be a  
22 note to you, have Wilson contacted by Regina City  
23 Police and Nichol John through RCMP Kelowna to see  
24 if they wish their addresses divulged to lawyer  
09:05 25 for Milgaard family, and I take it you would have



1           been asked to follow up on that or have someone  
2           follow up on that?

3           A           Yes.

4           Q           If I could call up 025332 and it's a memo, January  
09:05 5           19th, '81, from you to Detective Staff Sergeant  
6           Karst and you ask him to contact Wilson and John  
7           and confirm whether they wish to have their names  
8           released to the lawyer for Milgaard. You say I'm  
9           sure they won't, however the chief would like to  
09:06 10          know that specifically so he can tell the lawyer,  
11          and I take it that would have been your memo?

12          A           Yes.

13          Q           Why did you say there you are sure they won't want  
14          their name released?

09:06 15          A           I don't know why I said that. I think it might  
16          have been just an intuition that witnesses would  
17          not want to correspond with the request.

18          Q           If we could call up 106841, please, and this is  
19          Mr. Karst's letter of January 21 to the chief  
09:06 20          saying he's contacted Wilson and he says he  
21          doesn't want his name or information released and  
22          have also located and spoken to Nichol John, she  
23          also states she does not want her name to be given  
24          to any lawyer, and then down at the bottom, I take  
09:06 25          it is that your writing indicating you would have



1 got a copy of that?

2 A Yes.

3 Q If we could then go to 106849, please. I'm sorry,  
4 106840 maybe. No, sorry, it's a January 23, 1981  
09:07 5 letter. Sorry, try 842. We're getting closer.

6 That's it. This is a letter of January 23, 1981  
7 from Chief Gibbon back to Mr. Gary Young, the  
8 lawyer for the Milgaard family, and just call out  
9 the second paragraph, please. Mr. Gibbon goes on  
09:08 10 to advise Mr. Young that Cadrain, Wilson and John  
11 do not want their whereabouts made known to Mr.  
12 Young, and that's consistent with what you found  
13 out in your work; is that correct?

14 A Yes.

09:08 15 Q And then if we could scroll down to the next full  
16 paragraph, please, Mr. Gibbon says:

17 "As I indicated to you previously, I  
18 recognize that cases can be re-opened,  
19 however, I also recognize that certain  
09:08 20 procedures should be followed. If the  
21 Milgaard family have reasons sufficient  
22 to cause a review of this case, we are  
23 certainly prepared to co-operate by  
24 making our file available to a  
09:08 25 representative of the Attorney's General





1 Department. We would, of course, point  
2 out that the three witnesses you are  
3 trying to locate have indicated they do  
4 not wish their whereabouts made known,  
09:08 5 but it would then be up to the  
6 representative of the Attorney General  
7 to decide whether those people should be  
8 interviewed and by whom."

9 And I asked you this question in relation to an  
09:08 10 earlier letter by Chief Gibbon, but you would  
11 have followed, this is January, '81, you would  
12 have become chief in a year or so, or less than a  
13 year after this letter; is that fair?

14 A Yes.

09:09 15 Q And does the position put forward by Mr. Gibbon,  
16 is that consistent with what position you had or  
17 would have taken on this matter?

18 A Yes.

19 Q And are you aware as to whether anybody from the  
09:09 20 Attorney General's department of Saskatchewan ever  
21 asked you to make your file available to them for  
22 a review of the conviction?

23 A I was never contacted for that purpose.

24 Q Now, I think you told us yesterday that you did  
09:09 25 get contacted by Federal Justice, by Mr. Eugene



1 Williams, in connection with Mr. Milgaard's  
2 application under Section 690 of the *Criminal*  
3 *Code*?

4 A Yes.

09:10 5 Q And if I could call up 004910 -- I'm sorry, 004906  
6 is the doc ID -- and this is a report prepared by  
7 Sergeant Pearson of the RCMP and if we could go  
8 to -- just go back to the first page for a moment,  
9 please. This is a report that he prepared on  
09:10 10 April 17th, 1990 and Sergeant Pearson and Mr.  
11 Penkala were involved in assisting Eugene Williams  
12 in the review. If we could now go to page 910,  
13 call out paragraph (j), it says:

14 "On 90 March 23, Mr. Williams and  
09:11 15 myself --"

16 Being Sergeant Pearson,

17 "-- met at the Bessborough Hotel,  
18 Saskatoon, for the purpose of exchanging  
19 information on this file. Later this  
09:11 20 same date Mr. Williams and myself met  
21 with Saskatoon City Police Chief  
22 Penkala, Deputy Chief Montague, Supt.  
23 McCorrison and Insp. Quinn. The  
24 purpose of our meeting was fully  
09:11 25 explained and complete courtesy and



1 co-operation was extended, and I was  
2 given complete access to the police  
3 investigation they conducted into this  
4 murder some 20 years previous. All in  
09:11 5 attendance at the meeting agreed that it  
6 would be more appropriate for certain  
7 questions to be answered by a member of  
8 an outside agency, in view of the  
9 potential publicity this may have at a  
09:12 10 later date."

11 And does that note of Sergeant Pearson, is that  
12 consistent with your recollection of what was  
13 discussed at the meeting?

14 A Yes.

09:12 15 Q And I take it then that Eugene Williams asked for  
16 access to the police file?

17 A Yes.

18 Q And did you provide him with complete access to  
19 everything you had on the Gail Miller murder file?

09:12 20 A Yes.

21 Q And I will take you to some of these documents  
22 later, but at some point did Mr. Williams and Mr.  
23 Pearson also ask for access to the sexual assault  
24 files that Mr. Fisher had been convicted of?

09:12 25 A I don't recall specifically about the rape files,



1           although I would suggest that if that was  
2           requested, it would be provided under the same  
3           authority that was received initially to deal with  
4           the Milgaard file.

09:12 5           **Q**       If we can then go to 025 -- pardon me, let me just  
6           pause for a moment. What is this, when they talk  
7           about it would be more appropriate for certain  
8           questions to be answered by a member of an outside  
9           agency, can you tell me what that is referring to,  
09:13 10          and I appreciate this is Sergeant Pearson's note.

11          **A**       Yeah. I could only guess what that was. In light  
12          of the publicity that was going on at that --  
13          particularly by the media, that it would be  
14          prudent for an outside, independent agency to be  
09:13 15          involved in that.

16          **Q**       And then it talks about questions to be answered  
17          by. I'm wondering if you can recall, was there a  
18          discussion at this meeting about city police not  
19          responding to media requests, for having them  
09:13 20          through Eugene Williams or anything of that  
21          nature?

22          **A**       No, I wasn't aware of that possibility even coming  
23          up. I don't recall any discussion on who would  
24          make releases or if releases were necessary.

09:14 25          **Q**       And then if we can go to 025663, please, this is a



1 letter, March 15th, 1990, and which I think  
2 predates your meeting with Eugene Williams, and  
3 just -- and Constable Farion was an analyst with  
4 the police force at the time?

09:14 5 A Yes.

6 Q And what was the job of an analyst?

7 A Generally reviewing -- similar to being an auditor  
8 or a -- just to ensure that the policies were  
9 being followed and things were done according to  
10 the directions and policies of the department.

09:15 11 Q And Constable Farion here says as per the request  
12 of Chief Montague. Is it a he or she, Farion?

13 A Pardon me?

14 Q Male or female, Farion?

09:15 15 A Male.

16 Q And then he would have reviewed the Gail Miller  
17 file and answered the questions posed by  
18 Mr. Williams, so I take it that there had been a  
19 request by Mr. Williams for some information?

09:15 20 A It would appear that, yes.

21 Q And he goes on to say:

22 "The notebooks of former Inspector  
23 Parker were located and checked by  
24 myself and you and they contain no  
09:15 25 further information pertaining to Linda



1 Lillian Fisher's statement of April  
2 28th, 1980; therefore, the responses I  
3 have provided are based on all the  
4 documented information contained in the  
09:15 5 file which I was given to review."

6 So I take it you would have employed some police  
7 personnel to review the file and answer questions  
8 posed by Mr. Williams?

9 A Yes, and in this case it was to Inspector Quinn.

09:15 10 Q And what was Inspector Quinn's role in this?

11 A He would have been in charge of the investigation  
12 support unit of the police department.

13 Q And so would Inspector Quinn be the person that  
14 you delegated to sort of oversee the review of the  
09:16 15 Gail Miller files at this time?

16 A Umm, well I'm not sure that it was a complete  
17 review of the file, I think there was some  
18 specifics that we went back to that original  
19 letter. I think that letter was directed to --  
09:16 20 was it directed to Montague?

21 Q Umm --

22 A In any event, it was sent down the line, to speak  
23 of, and eventually ended up in the hands of  
24 Constable Farion to provide the information that  
09:16 25 was being sought.



1 Q At some point around this time, Mr. Penkala, did  
2 you cause to have the Gail Miller murder  
3 investigation file organized and copied?

4 A Umm, yes. At some point I had given direction,  
09:17 5 not only that particular file but there were other  
6 files, that I had asked that they would be  
7 addressed and catalogued and indexed.

8 Q And what files would those other files, would  
9 those be?

09:17 10 A There was other unsolved murders and serious crime  
11 files and it was a task that was assigned so that  
12 these things could be put together for easy  
13 reference when the need came up.

14 Q And so would this be for the purposes of assisting  
09:17 15 Mr. Eugene Williams or responding to his questions  
16 then?

17 A I'm not sure whether it was for that purpose, but  
18 because questions were being asked and there were  
19 some difficulties in going through a massive,  
09:17 20 massive file, I think it was decided that that  
21 should be done, even at a cost it should be done,  
22 and it would be a lot easier to make references,  
23 you would have cross-references for names and the  
24 activities of investigators and so on.

09:18 25 Q And at that time, prior to the organization, where



1 would the files be located then?

2 A Umm, supposedly in central records, at -- that  
3 would be the, that would be the storehouse for  
4 all, all Saskatoon, all Saskatoon records.

09:18 5 Q And would that be paper copies? I'm talking,  
6 let's talk about the --

7 A They would be hard copies, yes.

8 Q Hard copies?

9 A Yes.

09:18 10 Q So, for the Gail Miller file, the hard copies  
11 would have been at central records?

12 A Yes.

13 Q And would they be all located in one, one  
14 location, one file, or can you tell us a bit about  
09:18 15 how they would have been stored?

16 A I, I would assume that they were all together,  
17 but, you know, because of the volume involved in  
18 the file it might have been broken up into, into  
19 several volumes, but yes, it would be in one  
09:18 20 place.

21 Q And then what about the sexual assault files, and  
22 in particular the (V1)-/(V2)-----/(V3)----- and  
23 (V5)--- assault files; what would be -- where  
24 would those have been stored?

09:19 25 A They would also be stored, the master file would





1 be stored in central records.

2 Q And would that be hard copy or microfiche?

3 A They would be hard copy.

4 Q And what was the process of microfiching, doing  
09:19 5 microfiche on these files?

6 A Umm, I wasn't specifically physically involved in  
7 that. We had a manager of central records and he,  
8 I think he would assign these duties to regular  
9 clerks that would be given boxes of files, and  
09:19 10 there was an apparatus that was set up and each  
11 page individually had to be placed into this  
12 apparatus and it would get photographed, and the  
13 hard copies would be retained until the  
14 verification of the developed microfiche could be  
09:20 15 checked against it, and then the process would be  
16 to destroy the hard copies.

17 Q And during your tenure as chief, then, I think you  
18 were '82 to '91, what; was there any -- were some  
19 files destroyed, like not retained at all on  
09:20 20 microfiche or hard copy in certain cases?

21 A Well they should have been microfiched, that's for  
22 sure, that -- that was the, that was the policy.

23 Q Okay.

24 A And many files of a serious nature, the hard  
09:20 25 copies would be retained. There was actually a



1 statute, a provincial statute, that directed the  
2 method that retention of certain files had to be  
3 maintained.

09:21 4 Q Right, and I will take you to that a bit later  
5 when we deal with a report. And so who would have  
6 been responsible, do you recall -- I think we saw  
7 the binders, in fact we see the binders here  
8 before the Commission, binders A to F and the  
9 pages numbered; who would have been in charge of  
09:21 10 assembling that?

11 A You know, I don't know, I don't remember  
12 specifically who was charged with the  
13 responsibility. That should, should be there  
14 somewhere indicating who was responsible, but I  
09:21 15 don't know this off my top of my mind.

16 Q Okay. But you would have asked someone to  
17 assemble all the records?

18 A Yes, yes.

19 Q If we could call up 105315, please, and this is  
09:21 20 your handwritten note, is it, Mr. Penkala?

21 A Yes.

22 Q And it refers to a call on June 6th, '90 from  
23 Eugene Williams, and he is seeking documented  
24 information, 1, call out paragraph 1:

09:22 25 "Whether file has polygraph



1 result report relative to the witness  
2 Ronald Wilson who was questioned in  
3 regard to case.

09:22 4 Wishes to have established the  
5 times and dates (length of time of  
6 questioned) in this regard and also  
7 other previous occasions when Wilson was  
8 questioned."

9 And secondly:

09:22 10 "Request similar information  
11 on the witness Nichol John. This also  
12 includes documentation of polygraph  
13 results and report of polygraphist.

14 Please establish these  
09:22 15 particulars and where possible, fax  
16 documentation to Mr. Williams."

17 And so I take it that would be a note of a phone  
18 call you had from Mr. Williams?

19 A I would assume that that's how that took place,  
09:22 20 yes.

21 Q And then if we could call up 105317. And this is  
22 a letter, June 11th, 1990, to the attention of  
23 Inspector Quinn. It also has your name on the  
24 letter. This is from Constable Farion, and just  
09:23 25 call out the first paragraph:



1 "As per the request of Chief J. Penkala,  
2 on behalf of Mr. Eugene Williams ...",  
3 it goes on to say that he has reviewed the Gail  
4 Miller murder file, and you will see here:

09:23 5 "The responses I have been able to  
6 develop from the file in relation to the  
7 requested information are not totally  
8 conclusive. There are no specific times  
9 documented in the file as per length of  
09:24 10 interviews, etc., ...",

11 and then it says:

12 "The answers I have been able to provide  
13 have been associated to the file by way  
14 of reference to the file indexing. This  
09:24 15 was done so as to enable Mr. Williams to  
16 cross reference the answers, if  
17 necessary, to the file for further  
18 clarification. As was the case  
19 previously, the responses I have  
09:24 20 provided for this inquiry are based on  
21 all the documented information contained  
22 in the file."

23 And if we could just scroll down and go to the  
24 next page for a moment, please, we'll see  
09:24 25 reference here to binder and page number; do you



1 see that under Ron Wilson?

2 A Yes.

3 Q And we, in fact, have -- police files that were  
4 provided to the Commission were provided in those  
09:24 5 binders A to F, so I take it by June 11th, 1990,  
6 those police binders had been put in place; is  
7 that fair?

8 A It would appear that that was already done, yes.

9 Q Go back to the first page, please, and under  
09:25 10 Question 1 Constable Farion says:

11 "- There is no polygraph result report  
12 contained in the file pertaining to  
13 polygraph tests on either Ron Wilson or  
14 Nichole John. There is no conclusive  
09:25 15 information contained in the file to  
16 indicate polygraph tests having been  
17 conducted on either of the above named  
18 witnesses. There is information in the  
19 file to indicate the involvement of  
09:25 20 Inspector Roberts ... Calgary City  
21 Police ...".

22 And, Mr. Penkala, we have -- I believe at that  
23 time efforts were made with the Calgary Police  
24 and the records of Mr. Roberts of the polygraph  
09:25 25 are not -- have not been located, at least to the



1 best of our knowledge. Are you able to -- well  
2 let me ask you this. Back in 1969, what would  
3 have been the practice when you had Inspector  
4 Roberts come in from the Calgary Police Service  
09:26 5 to do work for you, would it be customary for him  
6 to leave a report for you?

7 A I would, I would have thought that that would be  
8 the process that would be followed, yes.

9 Q Now who would have access to -- let's say from the  
09:26 10 date of David Milgaard's conviction, 1970 until  
11 1990, the Gail Miller murder file and other files  
12 would be in central records; is that correct?

13 A Yes.

14 Q Who would have access to those files and for what  
09:26 15 purposes?

16 A The master file would be very stringently  
17 protected to ensure that it stayed intact. There  
18 would be remnants of that file probably in the  
19 detective division where the investigation was  
09:26 20 conducted, but that would not necessarily ensure  
21 the complete file. That's the recollection that I  
22 have in regards to how a file of that nature would  
23 be preserved. At some point I think the  
24 operational file would be either turned back into  
09:27 25 central records for ensuring that the master file



1 included all the documentation. That would be the  
2 normal process and the required process.

3 Q Could an officer remove part of the master file  
4 and, if so, under what circumstances?

09:27 5 A I would think not. I think that, that the  
6 custodian of the master file would be, would be  
7 concerned, that you could take copies. I recall  
8 when you needed information you could physically  
9 go to central records and they would produce the  
09:27 10 file, but they would ensure that you took the  
11 information, or if you asked you could have some  
12 copies made of that particular information.

13 Q And would a record be kept of who had access or  
14 who may have removed files?

09:28 15 A I would think in those circumstances, if you would  
16 remove the file, if you physically requested and  
17 were given permission to take the file then it  
18 would be charged to you, yes.

19 Q So there is a system to keep track of who, who  
09:28 20 would have taken items out of central records; is  
21 that --

22 A Yes.

23 Q If I could now call up document 217483, and this  
24 is a -- you will see, at the bottom, that's your  
09:28 25 signature dated June 6, 1990?



1 A Yes.

2 Q And it's got Penkala Statement at the top, and I  
3 understand this is something you would have  
4 released to the media at or about that time?

09:29 5 A Yes.

6 Q And let's just go through it. You talk about:

7 "In response to the

8 persistence of the media on the Milgaard  
9 controversy, I'm prepared to make this  
10 statement.

09:29

11 I'm disappointed in the  
12 attitude of the media in this entire  
13 affair.

14 My disappointment lies with the  
09:29 15 fact of the insensitivity of the media  
16 for the victims of a very heinous crime  
17 that occurred in 1969.

18 The victim in this crime was  
19 not only Gail Miller. It also lies with  
09:29 20 her immediate family who are re-living  
21 their grief each time the controversy is  
22 raised by the media. There is no  
23 displayed compassion for the family of  
24 Gail Miller and the media continues to  
09:29 25 promote the controversy which doesn't





1 require to be proven.

2 I can excuse the convicted  
3 murderer who has the legal right to  
4 employ the rules of Canadian Justice to  
09:29 5 have his fate reviewed, however, it  
6 disappoints me that the media has  
7 allowed itself to be used in promoting  
8 his cause.

9 I'm not prepared to defend or  
09:30 10 comment on any matters relative to the  
11 medias' Milgaard controversy. If there  
12 is an established need for a Judicial  
13 review, I will be available at such a  
14 call."

09:30 15 Now what prompted you to send this out, Mr.  
16 Penkala?

17 A The very aggressive requests by the media and the  
18 comments made by the media, I felt it was  
19 necessary to put my thoughts forward, I prepared  
09:30 20 this thing and put it forward and I recall they  
21 didn't like it.

22 Q Pardon me?

23 A And I recall they didn't like it.

24 Q The media didn't?

09:30 25 A Didn't like it, no.



1 Q And why is that?

2 A Well I suppose, I suppose they were looking for  
3 some specific utterance so that they could enlarge  
4 on it.

09:30 5 Q Had you been asked at this time by the media to  
6 comment on the specifics of the Milgaard case and  
7 his efforts to re-open?

8 A I don't recall. The entire, the entire thing at  
9 that particular time was just getting to the point  
09:31 10 where it was kind of a media frenzy, and I -- I  
11 found myself in the midst of this and I, and I  
12 simply wished to protect myself from, from making  
13 comments. And as I stated in my last paragraph, I  
14 would be available if it was necessary, and that  
09:31 15 somewhat put things to an end in regards to what  
16 they would receive from me.

17 Q When you say 'they' you are talking --

18 A The media, yes.

19 Q And so what were they after from you?

09:31 20 A I, I suppose any kind of comment.

21 Q And back to my earlier question, then; were the  
22 media seeking comments from you at or around this  
23 time, then, on the Milgaard case?

24 A Oh yes, yes.

09:31 25 Q And what, what, the nature of that was to comment



1 on the specifics of the investigation or the case,  
2 or can you help us understand what it was?

3 A Well there was -- I turned over a binder, I turned  
4 over a binder which had some clippings out of *The*  
09:32 5 *StarPhoenix*, it would be along the lines of that.  
6 It was, it was a --

7 Q Let me give you an example. The dog urine, we  
8 touched on this last week, where they went to you  
9 for comment; would that be one of the things where  
09:32 10 they would approach you -- in fact I think it may  
11 have even been around this time -- to comment on  
12 the report?

13 A That, that would be, that would be the kind of  
14 things that they would want to have enlargement  
09:32 15 on, yes.

16 Q And did you choose not to comment on that?

17 A Yes.

18 Q And why was that?

19 A Well I -- that example that you are quoting is an  
09:32 20 example of just how that escalated, and of course  
21 it cast a very negative account of me, as though I  
22 didn't know what I was doing and so on and so  
23 forth. I, you know, I personally, personally was  
24 injured by that attitude and that kind of  
09:33 25 publicity, which I knew there was more to it than



1           that.

2           **Q**       And why didn't you respond to that by saying 'you  
3           know, I had it checked, it was human, I did my  
4           job'; why didn't you tell the media that?

09:33 5           **A**       Well, I don't think it would have helped. I -- my  
6           experience was that, if you told them something,  
7           it was -- then they would go on to other things,  
8           and terribly time-consuming and misleading, I  
9           think, to the actual file and how it was  
09:33 10          investigated.

11          **Q**       If I could call up 004746, and here is a report  
12          August 29th, and we may -- is this an example, Mr.  
13          Penkala, of what you were referring to?

14          **A**       Yes.

09:34 15          **Q**       And the headline Penkala 'terrified' to discuss  
16          Milgaard: TV producer."

17          And if you could call out the first column, and  
18          it says:

19                                "Saskatoon police chief Joe

09:34 20                           Penkala was 'terrified' at the prospect  
21                           of talking to interviewers for the  
22                           television show, A Current Affair, about  
23                           the David Milgaard case, says the  
24                           producer of the piece.

09:34 25                           'He (Penkala) would say: 'I'm



1 not afraid of you, I'm not afraid to  
2 talk to you'', Cynthia Fagen said  
3 Tuesday in telephone interview from her  
4 New York office."

09:34 5 Do you recall a discussion with this Cynthia  
6 Fagen over this television show?

7 A Vaguely, yes.

8 Q Were you terrified to discuss the case with them?

9 A No, I wasn't terrified. I think -- well, that's  
09:35 10 exactly the type of media coverage that was being  
11 conducted, and the more you said or the more you  
12 tried to be accommodating the greater the pressure  
13 was to, in my opinion, to mislead the facts  
14 surrounding the actual investigation.

09:35 15 Q And if we could scroll over to the third column,  
16 please, it says:

17 "Penkala would have been a  
18 desirable interview because he was an  
19 investigator in the 1969 murder of Gail  
09:35 20 Miller, the crime Milgaard claims he did  
21 not commit.",

22 and then it says:

23 "Penkala was in Newfoundland  
24 Tuesday. But Scott ...",  
09:35 25 and that's referring to spokesman Sergeant Dave



1 Scott:

2 "... says Fagen's characterization of  
3 the chief is unfair."

4 And do you recall discussing, with Dave Scott,  
09:36 5 this article?

6 A Well I remember seeing this article.

7 Q And then it goes on to say:

8 "Penkala several weeks ago  
9 said he would not comment on the  
09:36 10 Milgaard case out of respect for the  
11 Miller family and because of the ongoing  
12 judicial process."

13 And would that be the press statement that I just  
14 showed you; is that --

09:36 15 A It would appear that it's in relation to that,  
16 yes.

17 Q And then it talks about 'the ongoing judicial  
18 process'; would that be Mr. Milgaard's application  
19 that Mr. Eugene Williams was dealing with?

09:36 20 A Umm, yes.

21 Q Now you are familiar, sir, with the issue of the  
22 missing sexual assault files; are you?

23 A Umm, not particularly acquainted with it, it -- it  
24 came to light just as I was retiring.

09:36 25 Q Let me tell you what I think is on the record.



1           There were four sexual assaults,  
2           (V1)-/(V2)-----/(V3)----- and (V5)---; the  
3           (V5)--- file I believe has been produced or at  
4           least we have copies of most if not all of it; the  
09:37 5           (V1)-/(V2)----- and (V3)----- files I don't  
6           believe were located. And I will go through some  
7           documents that outline efforts made in the early  
8           1990's to find those but I think, other than a  
9           couple of statements that may have been located  
09:37 10          from other sources, the police files for the  
11          (V1)-/(V2)-----/(V3)----- matters could not be  
12          located when a check was made in 1990. Is what I  
13          told you, is that your understanding of, generally  
14          about the status of those --

09:37 15          A           Yes.

16          Q           -- files?

17          A           Yes.

18          Q           And I wonder if we could just start off with some  
19          general questions. Do you have any explanation as  
09:37 20          to why those files would not have been there when  
21          people went to look for them in the early '90s?

22          A           Well I'm aware that there was an examination by  
23          the Saskatchewan Police Commission into that  
24          issue, and the results of that examination  
09:38 25          suggested that during the process of microfilming



1 the hard copies, that obviously -- that obviously  
2 the material was not microfilmed and had been  
3 missed. Now that was supported by the fact that  
4 there was a series, because the hard copies are in  
09:38 5 occurrence numbers which are in a series so one  
6 occurrence would follow another, and this was  
7 examined by the Saskatchewan Police Commission.  
8 My recollection is that the Crime Detection  
9 Laboratory was asked to look at the  
09:38 10 consecutiveness of the microfilm, and the  
11 indications were that there were no interruptions,  
12 so nobody took anything out of the microfilm.

13 The conclusion was that at some  
14 point, by error, a whole series of occurrences was  
09:39 15 set aside and obviously was not microfilmed and it  
16 would be and oversight on the part of the person  
17 that was operating and asked to microfilm the  
18 documentation.

19 Q Were you aware, sir, of any discussion or any  
09:39 20 information that would suggest that either of the  
21 (V1)-/(V2)----- or (V3)----- files were  
22 deliberately destroyed for some purpose in  
23 connection with the David Milgaard matter?

24 A I have no knowledge of that.

09:40 25 Q Now you will recall earlier this morning I showed





1           you the March 23rd, 1990 meeting with Eugene  
2           Williams about the police file and follow-up  
3           letters in June of 1990 regarding some questions  
4           he had asked; correct?

09:40 5           A           Yes.

6           Q           And I just want to go through some other documents  
7           here with you, Mr. Penkala, just in the timeline  
8           about these files. The first is a letter 010033  
9           and this is a letter from Mr. Wolch, David  
09:40 10          Milgaard's lawyer, to Eugene Williams of July 5,  
11          1990. Call out the second paragraph. And at this  
12          time, Mr. Penkala, I believe about a week or a few  
13          days earlier the names of the sexual assault  
14          victims had been identified, and that information  
09:41 15          had been provided to Mr. Williams I believe by  
16          Mr. Wolch or Mr. Asper, and it says:

17                    "This will also confirm that we are most  
18                    anxious to receive all the details  
19                    regarding the seven other serious sexual  
09:41 20                    assaults committed by Larry Fisher. As  
21                    I indicated to you, we have the names of  
22                    the victims so it is not a matter of  
23                    prying into their personal affairs, but  
24                    rather we are interested in looking at  
09:41 25                    patterns and similar acts, etc."



1 If I can pause there, and I believe the seven  
2 other assaults committed by Fisher would be the  
3 (V1)-/(V2)-----/(V3)-----/(V4)---, being the  
4 four in Saskatoon, the two in Winnipeg, (V8)---  
09:41 5 and (V7)---, and the seventh would be (V10)  
6 (V10)- in North Battleford in 1980, is what I  
7 believe the seven are referred to. And then it  
8 goes on, if we can go on, just call out, go down  
9 to the very bottom, actually the bottom five  
09:41 10 lines, please. And Mr. Wolch says:

11 "Clearly you would have better access to  
12 the record and the police reports than  
13 we would, and yet in spite of the fact  
14 that we furnished the information some  
09:42 15 time ago, it appears that you either did  
16 not receive the information or received  
17 wrong information in this regard."

18 And so I pause there. I -- the issue of the  
19 Fisher rapes, I think, was raised in February or  
09:42 20 March of '90, it was the names I think that was  
21 provided in July. In any event, it appears here  
22 that Mr. Wolch is asking Mr. Williams for the  
23 police reports relating to those sexual assaults,  
24 and if I could go to 010019, and this is Mr.  
09:42 25 Williams' memo to file on July 5th, 1990 and



1           refers to a discussion on July 4, 1990:

2                   "... learned from Bruce MacFarlane that  
3                   Hersh Wolch had the names of four  
4                   Saskatoon rape victims, allegedly  
09:43 5                   assaulted by Larry Fisher. This  
6                   information did not accord with the  
7                   information we had earlier received from  
8                   the R.C.M.P. and the Saskatoon City  
9                   Police, who advised us that there were  
09:43 10                  not any incidents of rape attributed to  
11                  Larry Fisher, which occurred in  
12                  Saskatoon."

13           And I believe there is a document from Sergeant  
14           Pearson of the RCMP where I think he wrote about  
09:43 15           the rapes occurring in Regina based on the fact  
16           that that's where Mr. Fisher was convicted, and  
17           we'll hear evidence from others on that, I just  
18           simply point it out for reference sake.

19                   And then, if you could scroll  
09:43 20           down, you will see it's got the names, and I  
21           won't go through, and if you go to the next page,  
22           please, and it says:

23                   "After speaking with Mr. Wolch, I asked  
24                   Sgt. Pearson to search the Saskatoon  
09:44 25                   City Police Files to determine whether



1 Larry Earl Fisher was convicted, as  
2 alleged of the rapes and indecent  
3 assaults of the victims noted above. If  
4 there was a link, I requested that he  
09:44 5 send occurrence reports and witness  
6 statements, where available, which  
7 relate to the offences. He agreed to do  
8 so."

9 And then scroll down to the bottom paragraph:

09:44 10 "In a later conversation that day, Sgt.  
11 Pearson noted that the convictions  
12 registered in Regina apparently occurred  
13 in Saskatoon. He will redouble his  
14 efforts to locate the files and provide  
09:44 15 the materials I requested."

16 Now we will be hearing from Sergeant Pearson and  
17 Eugene Williams on the details of this, but it  
18 appears from this that Mr. Williams had asked  
19 Sergeant Pearson on July 5, 1990 to try and  
09:44 20 locate the Larry Fisher sexual assault files the  
21 Saskatoon City Police had, and who, with the city  
22 police, would they have been dealing with on  
23 that; would that be through you or Inspector  
24 Quinn or who would Pearson talk to on that?

09:45 25 A I'm not particularly sure. I would think that



1           probably he would deal with the detective division  
2           or go directly to central records to receive that  
3           information directly from the manager of central  
4           records.

09:45 5           **Q**       Had you at that time, and we're talking July of  
6           1990, provided Sergeant Pearson with access to  
7           your records; in other words, if he wanted to go  
8           and try and locate these files, you had people  
9           there available to assist him?

09:45 10          **A**       Well, it was a situation where if you were a  
11          police officer and you identified yourself in that  
12          sense, that information would be provided without  
13          any difficulties.

14          **Q**       Do you recall if efforts were made in July of 1990  
09:46 15          or thereafter to locate the four sexual assault  
16          files?

17          **A**       At what period of time?

18          **Q**       Well, after this memo of July 5, 1990 it appears  
19          that Williams asks Pearson to locate the files and  
09:46 20          at some point after that. Are you aware as to  
21          whether or not --

22          **A**       Not specifically.

23                    COMMISSIONER MacCALLUM: As to whether or  
24                    not what?

09:46 25           BY MR. HODSON:



1 Q As to whether or not efforts were made by Sergeant  
2 Pearson to locate the sexual assault files?

3 A With the exception that at some point it was  
4 turned over to the Saskatchewan Police Commission  
09:46 5 who further investigated that.

6 Q And I'll get to that in a moment. If we could  
7 then go to -- so I take it from that, Mr. Penkala,  
8 were you directly involved in assisting either  
9 Eugene Williams or Sergeant Pearson or anybody  
09:47 10 else in trying to locate the (V1)-, (V2)-----,  
11 (V3)----- and (V5)--- files?

12 A No.

13 Q If we could then go to 166110 and this is a letter  
14 from Mr. Wolch to Senator Nathan Nurgitz on the  
09:47 15 matter and if you could refer to the second page.  
16 Again, this is a year later, Mr. Penkala, and  
17 there's a reference in this letter that says:

18 "Once we had identified Larry Fisher to  
19 the Department of Justice, an  
09:47 20 investigator from the RCMP was assigned  
21 to review the case. We also made a  
22 request of Mr. Williams from the  
23 Department of Justice that we be  
24 provided with copies of all of the  
09:47 25 police reports relating to Fisher's



1 activities. We were advised that such  
2 reports did not exist. However, in our  
3 recent investigation, our investigator  
4 was physically shown a copy of one of  
09:48 5 the reports. This is obviously a matter  
6 of great concern to us."

7 So it appears in July of 1991, at least according  
8 to this letter, and again, Mr. Penkala, we'll be  
9 hearing evidence from others, Mr. Williams and  
09:48 10 others on this, but I want to know whether you  
11 were involved or aware -- it appears at this  
12 time, July of 1991, that a response was provided  
13 that the Fisher sexual assault files did not  
14 exist. Do you see that?

09:48 15 A I see that, but at that stage I was, I have no  
16 recollection of these inquiries or the activities  
17 surrounding them.

18 COMMISSIONER MacCALLUM: Would you identify  
19 that letter again for me, please, Mr. Hodson?

09:48 20 MR. HODSON: Yes. It's 166110.

21 COMMISSIONER MacCALLUM: Yes. And the  
22 date?

23 MR. HODSON: It's July 10th, 1991.

24 COMMISSIONER MacCALLUM: And it is a --

09:49 25 MR. HODSON: It's a letter from Mr. Wolch



1 to Senator Nathan Nurgitz.

2 COMMISSIONER MacCALLUM: Oh, okay.

3 BY MR. HODSON:

4 Q Now, you retired as chief in 19 --

09:49 5 A Yes, and I was just, I was going to identify the  
6 fact that I had an accumulation of vacation time  
7 that I had not been able to take off because of  
8 the requirements of the job and I literally left  
9 the office physically on May the 1st of 1991 and I  
09:49 10 did return from time to time as there was a need  
11 to tend to certain issues. My official retirement  
12 date fell on the 1st of August of -- no, the 1st  
13 of September of '91, but I was more or less  
14 physically away from the office from the 1st of  
09:50 15 May of '91.

16 Q Were you still the chief of police though, you  
17 still had that title from May to August?

18 A Yes.

19 Q And who would have been acting chief then in your  
09:50 20 absence?

21 A There was Deputy Chief Wagner was standing in in  
22 my stead and eventually Deputy Chief Montague took  
23 over because Wagner and I retired on the same day,  
24 except Wagner had used up his holidays prior to  
09:50 25 me.





1 Q If we could go to 151828, and this is a memorandum  
2 of August 20, 1991 from Eugene Williams to Mr.  
3 Corbett. If we could go to the second page,  
4 please, and this is just again Mr. Williams'  
09:51 5 comments and talking about the, he says:

6 "The applicant has mistakenly assumed  
7 that the similarities between the attack  
8 on Gail Miller and the Fisher assaults  
9 were not brought to the minister's  
09:51 10 attention or considered during the first  
11 application. This assumption is based  
12 on a mistaken recollection of a  
13 conversation I had with Mr. Wolch."

14 And the first application I believe, Mr. Penkala,  
09:51 15 was February 28th? February 28th, 1991, the  
16 minister dismissed Mr. Milgaard's application,  
17 and then Williams goes on to say:

18 "I had told Mr. Wolch that the  
19 occurrence reports for the 1968 assaults  
09:52 20 in Saskatoon were not available, and  
21 that the quality of the photocopy of the  
22 1970 assault in Saskatoon --"

23 Which would be (V5)---,

24 "-- was poor.

09:52 25 However, I had obtained a



1 sufficient information relating to the  
2 October - November 1968 charges from  
3 court documents and considered this  
4 information during the assessment of the  
09:52 5 first application. I had also obtained  
6 and considered the occurrence reports  
7 from the Winnipeg assaults."

8 And so, Mr. Penkala, when I read that, I'm  
9 wondering whether you have any knowledge as to  
09:52 10 whether or not efforts were made by the police to  
11 find these sexual -- and when I'm talking about  
12 the sexual assault files, I'm talking about  
13 (V1)-, (V2)-----, (V3)----- and (V5)--- -- when  
14 those efforts were made, and secondly, whether --  
09:52 15 let's take it after 1990, the first moment that  
16 you became aware that Mr. Milgaard was applying  
17 for a review, whether you ever became aware of or  
18 saw the (V1)-, (V2)----- or (V3)----- files?

19 A I don't recall ever seeing those files and I don't  
09:53 20 have any recollection that there were any requests  
21 made of me personally in regards to that. Other  
22 than the fact that these instructions may have  
23 been within the operational people, I was not  
24 aware of what was going on.

09:53 25 Q Now if I could go ahead to 227035, please, and



1 this is a report, I believe, in August -- is it  
2 August 17th? I think it's August 17th, 1991. I  
3 will check that. And if we could just call out  
4 this part, and this is quoting a fellow by the  
09:54 5 name of McCloskey. Do you recall hearing reports  
6 of the Centurion Ministries and Mr. McCloskey back  
7 at the time in efforts on behalf of David  
8 Milgaard?

9 A Yes, it was in the newspapers, yes.

09:54 10 Q And he says:

11 "McCloskey said his investigation has  
12 uncovered compelling evidence to show  
13 not only that Fisher committed the  
14 Miller murder, but that Saskatoon police  
09:54 15 ignored this evidence rather than having  
16 to review the Milgaard conviction.

17 "Once Fisher confessed (to the other  
18 rapes), it would have really looked bad  
19 and humiliated them to re-open  
09:55 20 Milgaard," said McCloskey, "So they  
21 covered up their tracks and covered  
22 their crime."

23 I'll just pause there, Mr. Penkala, and ask for  
24 your response to that allegation.

09:55 25 A Well, I don't know if I have a response because



1           it's just not the way I understood it at all.  
2           There's no connection in that kind of a statement.  
3           It just doesn't -- it just doesn't register at  
4           all, the suggestion being that we ignored that. I  
09:55 5           have no knowledge of that.

6           **Q**       If you would have been aware in 1971 of Mr.  
7           Fisher's conviction after David Milgaard had been  
8           convicted, are you able to tell us what if  
9           anything you would have done?

09:56 10          **A**       Well, it would have certainly depended on what  
11          kind of evidence would have come out of that  
12          conviction and what the circumstances were. I was  
13          never aware of those circumstances, I was never  
14          really aware that Mr. Fisher had been charged with  
09:56 15          those offences which occurred in Saskatoon and  
16          that happened later on when the results of the  
17          Milgaard inquiry came up and then the guilt of the  
18          Miller murder was assessed to Larry Fisher and at  
19          that time I was out of the service, I would have  
09:56 20          had restrictions on gaining access other than the  
21          collection of things that I had personally  
22          retained which were copies of my own reports and  
23          the public reports.

24          **Q**       If we go back to 1971, and I think you told us you  
09:57 25          weren't aware that Mr. Fisher pled guilty, or was



1 convicted of those assaults, are you able to tell  
2 us whether, again back at that time, Mr. Penkala,  
3 given that you had noticed some similarities  
4 between the sexual assaults on (V1)- and (V2)-----  
09:57 5 and the Gail Miller murder, and let's go to 1971  
6 after Mr. Milgaard has been convicted of the  
7 murder, if you had become aware of a perpetrator  
8 confessing or being convicted of those two, the  
9 (V1)-/(V2)----- rapes, would that have caused  
09:57 10 anything to happen, or anything on your radar  
11 screen to say I should check into this or not?

12 A Well, I would first have to be convinced that  
13 David Milgaard was not responsible and I think at  
14 that point I didn't know that, and secondly, as I  
09:58 15 explained earlier in my testimony here, is that  
16 simply because there was a similarity in the  
17 method of attack and so on did not necessarily  
18 mean it was the same perpetrator and, you know, I  
19 don't know what else I can add to that.

09:58 20 Q If we could just scroll down to the bottom of that  
21 page and he says:

22 "Why did the Saskatoon police not  
23 publicize the conviction of this West  
24 Side rapist?" Henderson said. "Because  
09:58 25 if they did, then they would probably



1                   have to review their conviction of David  
2                   Milgaard."

3                   And if we can pause there. I asked you yesterday  
4                   about media reporting. Was it the practice at  
09:59 5                   the time in 1970/'71 to publicize convictions?

6           A           No.

7           Q           And then it goes on to say:

8                   "It looks like a deliberate cover up of  
9                   (Fisher's) arrest and conviction."

09:59 10           And I think I asked you that yesterday, were you  
11           aware of any deliberate cover-up of Fisher's  
12           arrest and conviction in 1971?

13          A           No.

14          Q           And then if we could go to 325145 and this is in  
09:59 15           the *Saskatoon StarPhoenix* August 17th and I think  
16           this is the front page and says, "'Frame'  
17           alleged," and again McCloskey, and then if we  
18           could just go to the next -- pardon me, to 004630,  
19           and this is the article I think that's contained  
10:00 20           in that edition, just call out the bottom part  
21           there, and again it talks about:

22                    "If this became public, then all kinds  
23                    of questions would have been raised"

24                    said McCloskey. "They (Saskatoon

10:00 25                    police) buried it. They even had Larry



1 Fisher sentenced in Regina, which is  
2 unusual."

3 Just go to the top of the next page. "... Fisher  
4 sentenced in Regina, which is unusual." And then  
10:00 5 if you could go just down -- go back to the full  
6 page, it says:

7 "Joe Penkala, chief investigator for the  
8 Miller murder --"

9 And if I can pause there, were you the chief  
10:01 10 investigator for the Miller murder?

11 A No.

12 Q "-- retired this summer as chief of  
13 Saskatoon police. Penkala and Saskatoon  
14 police have refused to comment on the  
10:01 15 case."

16 And, Mr. Penkala, there are some serious  
17 allegations in these articles would you agree?

18 A Yes.

19 Q It says, "'Frame' alleged." At this time did you  
10:01 20 choose not to respond to those and, if so, why  
21 not?

22 A Well, to me they were obvious conjectures on the  
23 part of the people that were making these  
24 statements and I don't believe that the weighters  
10:01 25 of these issues is through the media and I just



1 simply ignored them.

2 Q And how do you respond to the allegation of, it  
3 may have only been a headline, but about a frame,  
4 framing Mr. Milgaard?

10:02 5 A Well, that's a pretty disturbing and irritating  
6 comment and I don't believe it at all.

7 Q If we could go to 057451, and this is a *Globe and*  
8 *Mail* article of I believe August 29, 1991. Just a  
9 moment and I can verify that. August 29th, 1991,  
10:02 10 and it says, "Police can't find rape files." So  
11 this would be about 12 days after the article I  
12 just showed you about Mr. McCloskey, and if you  
13 could call out that paragraph, it says:

14 "Files that may have a crucial bearing  
10:02 15 on whether David Milgaard is guilty of  
16 murder have disappeared from the  
17 Saskatoon Police Department's  
18 computerized records system and an  
19 internal investigation is underway, *The*  
10:03 20 *Globe and Mail* has learned.

21 "Something went on, it's very  
22 bizarre, it's something that just  
23 shouldn't happen, for every detail like  
24 that to vanish," a Saskatchewan police  
10:03 25 source said. "Somebody's tampered with





1 the system."

2 For several days, Saskatoon  
3 police have been investigating the  
4 apparent disappearance of at least four  
10:03 5 files that involve convicted  
6 Saskatchewan serial rapist Larry Fisher,  
7 who has been increasingly linked to the  
8 Milgaard case."

9 Now, there's a reference here to a Saskatchewan  
10:03 10 police source. Do you know who that was, Mr.  
11 Penkala?

12 A No, not specifically.

13 Q Do you know whether someone within the police  
14 service at the time was communicating information  
10:03 15 to third parties or to non-police people?

16 A That was my -- that's what I was led to believe,  
17 that there was a person within the police  
18 department that was releasing certain information.

19 Q And did anybody report to you at some later point  
10:04 20 as to who that person was?

21 A Well, I did learn a name, but I have no way of  
22 connecting the name to the actual occurrence.

23 Q Are you prepared to tell us who it is?

24 A I don't know if it's in my interest to do that. I  
10:04 25 think that information will be forthcoming.



1 Q In fairness, Mr. Commissioner, we will have other  
2 evidence on this point and I appreciate, Mr.  
3 Penkala, I take it what you are saying is you  
4 don't have firsthand knowledge; is that fair?

10:04 5 A That's correct.

6 Q We'll have other, ample evidence on this point.

7 COMMISSIONER MacCALLUM: Okay.

8 BY MR. HODSON:

9 Q Now, it talks about these files disappearing from  
10:04 10 the computerized records system, and at the time  
11 what was the record system; do you know?

12 A The general record system?

13 Q Well, I think you had told us that older files  
14 were put on microfiche; is that right?

10:05 15 A Yes, the process was to microfiche the hard copies  
16 before they were destroyed.

17 Q And were the microfiches kept in a computerized  
18 record system?

19 A It wasn't computerized, it was -- I guess it was,  
10:05 20 in a sense it was a computerized system. It was  
21 quite an accepted system, it was used in  
22 archiving, I don't think just strictly police, in  
23 police operations, but in other operations as  
24 well.

10:05 25 Q And then it says:



1 "Somebody has tampered with the system."  
2 Were you aware of anybody, or any evidence or  
3 information coming to your attention of somebody  
4 tampering with the system?

10:06 5 A No, other than the conclusions that were found as  
6 a result of the investigation of the Saskatoon  
7 Police Commission and my recollection is that the  
8 conclusion was that it was an error in the method  
9 of copying and that an entire series of  
10:06 10 occurrences were missed.

11 Q Okay. Go to the next page, please, and then it  
12 says, and this is again the same article, it says:

13 "In addition, the Globe has learned that  
14 there is apparently a fifth file  
10:06 15 missing. This involves an unsolved  
16 sexual assault on a University of  
17 Saskatchewan student, who told Saskatoon  
18 police that on or shortly after the day  
19 Miss Miller was killed, she was attacked  
10:06 20 a few blocks away."

21 And I believe that's referring to the (V4)----  
22 (V4)--- incident. Are you aware of that?

23 A Only through the information of others.

24 Q And then it goes on to say, if you could scroll  
10:07 25 down, please, a bit further, it says:



1 "Four Saskatoon police inspectors are  
2 now involved in trying to track down the  
3 missing files, the police source said.  
4 A number of officers have already been  
10:07 5 questioned, as have civilians involved  
6 in the maintenance of the computer  
7 system."

8 And were you aware of that happening, Mr.  
9 Penkala?

10:07 10 A Not specifically, no.

11 Q If we could go to 004592, and again this is the  
12 next day in the *Saskatoon StarPhoenix*, "Vanishing  
13 files 'unbelievable': Lawyer." Call out the  
14 first paragraph, it says:

10:07 15 "Within days of a private investigator  
16 alleging the Saskatoon Police Department  
17 framed David Milgaard for the 1969  
18 murder of Gail Miller, police files on  
19 Larry Fisher's brutal attacks on city  
10:08 20 women have apparently disappeared from  
21 the police department.

22 "This is unbelievable,"  
23 Milgaard's lawyer, David Asper, said  
24 from Winnipeg. "The files did exist  
10:08 25 prior to August 16th."



1 And on that point, Mr. Penkala, are you aware of  
2 whether or not these files existed, as Mr. Asper  
3 says, prior to August 16th?

4 A And I'm wondering of the year.

10:08 5 Q It would be 1991, and I think the August 16th is  
6 the date Mr. McCloskey gave his statements.

7 A I don't have any information and this is somewhat  
8 new to me.

9 Q And then scroll down, it says:

10:08 10 "Sometime between Aug. 16 and this past  
11 Tuesday --"

12 Which would be August 27th, 1991,

13 "-- the files went missing, Asper  
14 charged."

10:09 15 And I'm just wondering, Mr. Penkala, this is when  
16 you were chief, but you were not formally --

17 A I was physically away from the office, yeah.

18 Q And what this article says is that Mr. Asper is  
19 saying that the files were there on August 16th,  
10:09 20 1991 and then they went missing between August  
21 16th and August 27th, and I'm wondering if you  
22 have any information or response to that?

23 A I wasn't aware that they were available on August  
24 the 16th, 1990, or '91 was it?

10:09 25 Q Yes.



1 A I didn't know they were available at that time and  
2 really this is -- I have nothing to add or no  
3 knowledge of this.

4 Q If we could just scroll down, please, stop there,  
10:09 5 it says:

6 "At an Aug. 16 news conference in  
7 Toronto, Jim McCloskey, founder of the  
8 New Jersey-based Centurion Ministries,  
9 blasted the city police; claiming it  
10:10 10 coerced testimony from witnesses to  
11 manufacture a case against Milgaard.  
12 The department needed a scapegoat  
13 because the murder followed a series of  
14 brutal rapes in the city and police had  
10:10 15 no suspects, McCloskey said."

16 And go to the next column, please, and here:

17 "Information in those files may have  
18 been "so damning that whoever might bear  
19 the brunt has taken the risk so they  
10:10 20 won't get out," Asper said."

21 And then just scroll down a bit, it says:

22 "Former police chief Joe Penkala retired  
23 this month and is unavailable for  
24 comment. Penkala's replacement, Owen  
10:10 25 McGuire, was also unavailable."



1 Mr. Penkala, do you recall being asked to comment  
2 on these allegations at the time?

3 A No, no, I wasn't asked to comment on them, and of  
4 course again it's conjecture in a newspaper, so I  
10:11 5 wouldn't have wanted to respond even if I were  
6 asked.

7 Q Would you agree it's a fairly serious allegation  
8 made against the police?

9 A Yes, certainly.

10:11 10 Q And would there be a point where you would respond  
11 to those types of allegations, Mr. Penkala?

12 A I think the way the entire matter was progressing,  
13 I don't think I would have wanted, if I were still  
14 the chief, I don't think I would have wanted to  
10:11 15 respond to any of that unless it was on the  
16 direction of possibly the Justice Department, and  
17 the Federal Justice Department was already  
18 involved and I would assume that they would  
19 probably be the most reliable and the most  
10:11 20 authoritative people to comment concerning those  
21 allegations.

22 Q If I could call up 012700, and this is a report of  
23 August 28th, 1991, it purports to be to you as  
24 chief of police to the attention of Inspector  
10:12 25 Quinn, and I think you told us by this time you



1           were retired or serving out your retirement; is  
2           that right?

3           A           Yes.

4           Q           And it's called, "Analysis of sex crimes for 1968  
10:12 5           - 1970." Are you able to help us out as to what  
6           this is?

7           A           Not specifically because I wasn't there and I  
8           don't know --

9           Q           You had mentioned earlier about having a review  
10:12 10          of, I thought you said, murder and rape files at  
11          the time reviewed?

12          A           Well, there was -- I think as things progressed  
13          and there was some questions, I think that was  
14          done by Constable Farion for some specific reasons  
10:13 15          and it appears to me that this was proceeded after  
16          that.

17          Q           And so this -- did you do anything with this  
18          report or did others deal with it?

19          A           I don't think I even saw this report.

10:13 20          Q           Okay. Mr. Commissioner, this document has, and it  
21          was referred to in my opening remarks, it's got a  
22          list of statistics for the rapes in 1970 and it  
23          also has a listing, and we'll be hearing other  
24          evidence on this, it has a listing of all the  
10:13 25          occurrence numbers, names and details of assaults





1 from 1968 to 1970. I do not want that part of the  
2 document to become a public exhibit, it contains  
3 the names of complainants and accused, etcetera,  
4 but I think maybe if I can just have an order that  
5 for 012700, that for purposes of making it an  
6 exhibit, the names of victims and suspects will be  
7 excluded, or those pages?

8 COMMISSIONER MacCALLUM: How many pages  
9 have you got, Mr. Hodson?

10 MR. HODSON: There's actually a fair  
11 number. I can go and give you an example. If we  
12 go to 012 -- on the assumption that you're going  
13 to give me an order not publishing, I'll put it  
14 up, 012705, and we'll hear other evidence on  
15 this, but what somebody at the police service  
16 did, they went through and checked occurrence  
17 numbers, victim, location, suspect and then  
18 details and there's a whole set of these that are  
19 the statistics for '68, '69, '70 and it may  
20 become necessary for witnesses to deal with  
21 these. My concern is obviously the names on  
22 these pages I do not want published.

23 COMMISSIONER MacCALLUM: Or any information  
24 by which the names might be discovered?

25 MR. HODSON: Yes. So if I can have that



1 order for this document and we'll take  
2 appropriate steps when we post it.

3 COMMISSIONER MacCALLUM: Yes, so ordered.

4 BY MR. HODSON:

10:15 5 Q Now, next if I could call up 042831, please, and  
6 this is a memorandum from Mr. Graham, executive  
7 director of the Police Commission, to the Police  
8 Commission Board, re: Saskatoon Police Force -  
9 retention of files relating to Larry Fisher. Do  
10:15 10 you see that, November 18th, 1991?

11 A Yes.

12 Q And I think you referred earlier to the fact that  
13 there had been an investigation into what may have  
14 caused these files to go missing; is that correct?

10:16 15 A Yes.

16 Q If I can go to page 833, please, and there's a  
17 comment here, I presume that means the acting  
18 chief:

19 "... reiterated that there is no  
10:16 20 evidence, in his opinion, of tampering  
21 with files or any wrongdoing. He  
22 specifically requested that the board  
23 call in the Saskatchewan Police  
24 Commission to investigate whether there  
10:16 25 has been any tampering with files in



1                   this matter. His reason was that the  
2                   police force feels that an outside  
3                   investigation is the only way to  
4                   counteract the allegations that have  
5                   been made against them."

10:16

6                   Were you a part of that decision to send it to  
7                   the Police Commission?

8           A        No, I was already finished, retired, and  
9                   officially retired.

10:17

10       Q        If we could go to 042840, please. This is the  
11                   report and it's based, at least this part is based  
12                   on discussions, I think, with Gerry Keelan, and I  
13                   think you told us earlier he was the officer in  
14                   charge of central records at the time, was he?

10:17

15       A        He was the manager, yes. He was civilian  
16                   employee.

17       Q        He was a civilian?

18       A        Yes.

19       Q        And it says, starting here:

10:17

20                   "The filing system was a numerically  
21                   sequenced system with each report given  
22                   the next available number. The number  
23                   was followed by an oblique sign (/)and  
24                   the appropriate year."

10:17

25                   And so I take it when we see the Gail Miller file





1 the police building. Access to this  
2 area is obtained by requesting a key  
3 from central records' staff. The files  
4 are stored in cardboard files storage  
10:18 5 boxes on steel shelving. The area is  
6 neat and boxes are marked with their  
7 contents. The microfilm is also stored  
8 in a metal drawer cabinet designed for  
9 this purpose."  
10:19 10 Now does that -- 1980-'81 would have been right  
11 around the time you became chief; is that  
12 correct?  
13 A Yes.  
14 Q And how this is described here, does this accord  
10:19 15 with your recollection of how the files were set  
16 up at the time?  
17 A That's my recollection, yes.  
18 Q Do you recall what happened when the police moved  
19 from the old to new police station; was there  
10:19 20 something done with respect to documents?  
21 A Yes. I was involved in, during the construction  
22 of the police station, and that started in 1976.  
23 And my job was exclusively to act as a go-between  
24 the contractor, the architect, and the police  
10:19 25 department, I was basically the representative for



1 the police department. And my duties also  
2 included the planning for the move and the  
3 furnishing of the new facility, which opened on  
4 July the 1st, 1977, and during that process  
10:20 5 various departments were responsible for  
6 coordinating their specific department in the move  
7 to the new facility.

8 Mr. Keelan would have been  
9 responsible for assuring the transfer of the  
10:20 10 records from the old building into the new  
11 building and setting up the system that he is  
12 describing here.

13 Q Do you recall if, at around the time of the move,  
14 there was any effort to purge or delete or destroy  
10:20 15 hard-copy files?

16 A I'm --

17 Q In the --

18 A -- not aware. It would certainly rest within the  
19 hands of Mr. Keelan, he would, he would  
10:20 20 certainly -- I would certainly be assured that he  
21 would do it in accordance to the policies and the  
22 statutory requirements connected with the storage  
23 of records.

24 Q If we could go to page 042884, please. And,  
10:21 25 again, this is part of the Police Commission



1 report and it says:

2 "On November 16, 1982, J. Penkala, chief  
3 of police, issued a policy on file  
4 retention. This policy was a mirror of  
10:21 5 the Saskatchewan Police Act regulations.  
6 A copy of this policy is included. We  
7 do not have the written policy prior to  
8 this but do have the information from  
9 Keelan on what it was. The police of  
10:21 10 the day was under the direct control of  
11 the chief of the day in this case the  
12 late J. Kettles."

13 If we go to the next page, please, and this  
14 appears to be a directive from you November 16,  
10:22 15 1982 Re: File Retention Policy, and I believe  
16 it's to a number of addressees; is this something  
17 you would have sent out?

18 A That's the distributorship of this particular  
19 policy within the department.

10:22 20 Q And it says:

21 "This will serve to  
22 officially inform members and staff of  
23 the Saskatoon Police Department that the  
24 policy on file retention will be  
10:22 25 consistent with the provisions of the



1                   Provincial minimum standard regulations  
2                   and future amendments as set out in  
3                   Section 10 of the Saskatchewan Police  
4                   Act.

10:22 5                   This is effective as of  
6                   November 16, 1982.

7                   Members and staff who are  
8                   charged with file administration will  
9                   pay particular attention to the  
10:22 10                  identification of the files which fall  
11                  within the scope of these regulations."

12                  Go to the next page, and this talks about the  
13                  Saskatchewan Police Act regulation, and go to the  
14                  next page please. And so I take it you attached  
10:23 15                  the regulations to your directive and saying  
16                  'this is the policy'?

17                  A                  I don't recall that but that would be, that would  
18                  be consistent.

19                  Q                  And this goes on and it quotes, you will see at  
10:23 20                  the top it's March 19th, 1982, the regulation.  
21                  And it says:

22                                 "The following is a minimum standard for  
23                                 the retention of files. Police forces  
24                                 may, at their discretion, retain files  
10:23 25                                 for a longer period of time."





1 And then sub (d):

2 "Any offence under any of the following  
3 sections as listed ... namely:",

4 and you will see 'Rape'. And then just scroll  
10:23 5 down, please, and:

6 "Any offence for conspiracy to commit,  
7 attempting to commit or being an  
8 accessory to any of the foregoing  
9 sections."

10:23 10 "Concluded files - Ten (10) years  
11 Retention.",

12 and:

13 "Open - Unsolved Files - Indefinite  
14 Retention."

15 So do I take it from that, Mr. Penkala, that the  
16 policy you issued in 1982 required a concluded  
17 rape file to be kept for a minimum of ten years?

18 A Yes.

19 Q And after ten years then, under this directive,  
10:24 20 could it be destroyed?

21 A Umm, I think then it would go to a local, a local  
22 policy, because there was, I recall there was an  
23 indication we could keep records longer than that,  
24 we didn't have to abide by it as long as we didn't  
10:24 25 destroy them before the time frame provided by the



1 statute.

2 Q And during the term that you were chief then, from  
3 1982 to 1991, under this directive was there a  
4 practice to retain a concluded rape file after the  
10:24 5 ten-year statutory minimum?

6 A I can't really, I can't really answer that, I  
7 don't know.

8 Q Would there be reason --

9 A I was thinking, I was more, I was thinking more of  
10:24 10 files such as unsolved crimes of murder or  
11 unsolved rape files.

12 Q Right. And this talks about 'unsolved -  
13 indefinite retention', I'm focusing on the  
14 concluded files.

10:25 15 A Yes.

16 Q And let me put it this way; would there be any  
17 reason that you can think of that, after the  
18 ten-year retention period, would there be reasons  
19 that the police would retain a concluded rape file  
10:25 20 for example?

21 A Umm, not necessarily. The statute speaks for  
22 itself. If ten years have passed the maintenance  
23 of files, and if that particular file had been  
24 concluded and there was a disposition on the file  
10:25 25 I think they would be at liberty, after ten years,



1 to destroy the file.

2 Q And are you aware of any practice or directive or  
3 policy, while you were with the police force and  
4 specifically when you were chief, that guided when  
10:26 5 a concluded rape file would or would not be saved  
6 after the minimum ten-year period?

7 A Not really, no. I might, I might just add that  
8 the maintenance of hard-copy files is a very  
9 necessary thing, there is an abundance of paper  
10:26 10 that accumulates, and if the maintenance is not  
11 provided you simply do not have storage space to  
12 deal with that. So that that's a constant,  
13 ongoing problem and it has to be adhered to, and  
14 particularly to the statutory requirements for  
10:26 15 keeping of files, so there is an effort to cull,  
16 to cull the paper out of the system.

17 Q Did the police, do you recall whether or not the  
18 police would be contacted by the National Parole  
19 Board or a parole agency to get information from a  
10:27 20 police file of a convicted person?

21 A Umm, I would think they would, yes. I don't, I  
22 don't have a recollection of a specific issue, but  
23 I would think yes.

24 Q Were you involved in any of the -- who would look  
10:27 25 after handling requests from, for example, a



1 parole agency about copies of police reports or  
2 files for parole purposes?

3 A I would think that probably it would be a  
4 situation where access would, would be allowed  
10:27 5 directly to the manager of central records, who  
6 had that information and would be -- would know  
7 whether that information is to be shared with that  
8 particular agency or not.

9 Q If I could call up 093559, please. And this is a  
10:28 10 Correctional Services Canada Progress Summary for  
11 Larry Fisher dated September 15th, 1988, and it  
12 talks about a progress summary review on February  
13 12th, 1988, and if you could go to page 093561  
14 please. And it's reviewing a criterion, I won't  
10:28 15 go through with it all, but call that out, please.  
16 And it talks about the Fisher rapes in Winnipeg  
17 and the details, and then it goes on to talk  
18 about:

19 "On September 19, 1970,

10:29 20 Fisher dragged an 18 year old girl into  
21 a bush, beat her about the head and  
22 raped her at knife point."

23 So that's the Winnipeg. And it says:

24 "Although there are no police reports  
10:29 25 available outlining the three Rape and



1                   one Indecent Assault offences for which  
2                   Fisher was convicted in Regina on  
3                   December 21, 1971, it can likely be  
4                   assumed that the victims suffered some  
10:29 5                   physical and/or psychological harm as a  
6                   result of Fisher's assaults."

7                   And it -- at this stage, Mr. Penkala, are you --  
8                   I think you told us you don't personally recall  
9                   dealing with that, but would someone in your  
10:29 10                  police service be dealing with parole  
11                  authorities, then, on these police reports?

12           A           They could very well. There could be an  
13           investigator to the parole agent as well.

14           Q           And you --

10:29 15           A           But, basically, that would be recorded in that  
16           fashion I would think.

17           Q           And would it be the manager of central records  
18           that would have -- would be the gatekeeper, if I  
19           can call it that, of --

10:30 20           A           Well I would -- a lot of these things would be  
21           routine, routine inquiries, and under routine  
22           inquiries I would -- I would believe that a parole  
23           officer, who has the privilege and the right to  
24           see these things, would go directly to Mr. Keelan  
10:30 25           and Mr. Keelan would provide him the information



1           that he seeks.

2           **Q**       So that if they, they called and asked or wrote  
3                   and said 'can you provide us with the police  
4                   reports on Larry Fisher's sexual assaults', would  
10:30 5                   that be a routine matter, then, that Mr. Keelan,  
6                   or whoever was in his position, would respond to?

7           **A**       I would think so, yes.

8           **Q**       If we could just go back to the Police Commission  
9                   document, please, and go to page 042903.

10:31 10                   COMMISSIONER MacCALLUM:  What's the doc.  
11                   ID?

12                   MR. HODSON:  The doc. ID is 042831.  And  
13                   I'll maybe just finish up with this document, Mr.  
14                   Commissioner, and then we can break.

10:31 15           BY MR. HODSON:

16           **Q**       It appears from this report that November 15th,  
17                   1991 Treble and Graham from the Police Commission  
18                   interviewed you; do you recall that?

19           **A**       Umm, not specifically, but I'm sure that occurred.

10:31 20           **Q**       And this talks about:

21                   "... a department handbook which showed  
22                   the Detective superintendent reporting  
23                   to the deputy and a Morality inspector  
24                   reporting to the same deputy chief."

10:31 25           And then the comment is:



1 "This could account for part of the  
2 reason why these two groups did not talk  
3 to one another and share information on  
4 a regular basis."

10:32 5 And I'm not sure if that's the author's comment  
6 or yours; are you able to shed any light on that?

7 A I don't -- I don't -- I don't know. I, I don't  
8 think it would be my comment, to be honest.

9 Q At the time would it have been your, or at any  
10:32 10 time, your view that the two groups, being  
11 detectives and morality, did not talk to one  
12 another and share information on a regular basis?

13 A I, I think they are obligated to do that, so I  
14 really do not see that as a --

10:32 15 Q Next page, please. It goes on to talk about the  
16 file retention policy. You say you recall it much  
17 as Keelan has reported, and:

18 "When Penkala took office as chief he  
19 issued the orders and identified the  
10:32 20 attached order ...",  
21 which I've already touched on. And then it goes  
22 on to talk about notebooks.

23 "The policy on the use and retention of  
24 notebooks was described as being in the  
10:33 25 Force policy and that upon leaving the



1 Force members were required to turn in  
2 their notebooks."

3 And then it goes on to talk about an order that  
4 came into effect in 1967 and I'm wondering --  
10:33 5 actually if we could just go down to the -- it  
6 says:

7 "All completed Duty Memo Books will be  
8 retained by the individual Member who  
9 will be responsible for the storage,  
10:33 10 safe-keeping and the production of any  
11 memo book called for within the past ten  
12 years.

13 On leaving the force, Members  
14 are required to turn over to the  
10:33 15 Superintendent of Operations, all memo  
16 books in their possession, to be placed  
17 in storage and be available if  
18 required."

19 And then it has:

10:33 20 "As a point of interest I  
21 know from personal experience the point  
22 of notebooks is a contentious issue with  
23 police officers. While there is a  
24 standing order in place compliance is  
10:33 25 another matter. Penkala when I posed





1                   this question smiled and said that this  
2                   was one point that he had difficulty in  
3                   gaining compliance and he was never  
4                   satisfied that it was a good policy."

10:34 5                   Can you expand on that, Mr. Penkala?

6           A           Yes. In my own situation, because I spent a good  
7                   part of my service in identification, we were  
8                   extended the privilege of keeping our memo books  
9                   because we were often required to attend court  
10:34 10                  cases and so on, so we kept our own memo books.

11                                When I, when my tenure with the  
12                   police force was finished I had left all my memo  
13                   books from the day I started at the police station  
14                   but they were in the, in the chief's office, and  
10:34 15                  Chief Maguire replaced me and I wanted those memo  
16                   books, I wanted to keep them, and he -- he refused  
17                   to allow me to have those books, which is in  
18                   compliance with the policy where you are, on  
19                   retirement, you are to turn the books in.

10:35 20           Q           Yes.

21           A           I eventually, I eventually did get all my memo  
22                   books, and I, I have them in my possession. And  
23                   I, I wanted that. And I would, I would suggest  
24                   that memo books are, are the individual's record,  
10:35 25                  and while he may or she may be held accountable to



1 protect those notebooks, I don't think it's in the  
2 best interest to centrally store them and  
3 centrally look after them. I'm sure that, if I'd  
4 have turned my books in, I may not have the  
10:35 5 availability of -- of -- of the records that I  
6 kept.

7 Q Now the policy in place at the time was that they  
8 should be turned in?

9 A Yes.

10:36 10 Q And I take it that that wasn't always done by  
11 officers?

12 A Well, I don't know, I -- I related my own  
13 experience. But I know that we had situations  
14 where memo books were turned in and then, through  
10:36 15 the bureaucracy, the memo books were -- were,  
16 again in the interests of providing space, would  
17 have been destroyed, and unfortunately that's when  
18 you are required to produce those types of memo  
19 books, and they are just not available.

10:36 20 Q Okay. This is probably a good point to break, Mr.  
21 Commissioner.

22 COMMISSIONER MacCALLUM: 15 minutes.

23 (Adjourned at 10:36 a.m.)

24 (Reconvened at 10:57 a.m.)

10:57 25 BY MR. HODSON:



1 Q Go back to document 042831, please, and this is  
2 the Police Commission report dated November the  
3 18, 1991. And if we can go to 042905, and this is  
4 where we left off at the top, and then again this  
10:57 5 is Mr. Graham's report on a discussion with you,  
6 Mr. Penkala, these are his words, and he says:

7 "When we discussed the  
8 overlap of investigators between  
9 Milgaard and the Fisher investigators he  
10:58 10 said that the Morality officers would  
11 not be assigned the murder. He allowed  
12 that they would be assigned specific  
13 tasks related to the investigation but  
14 they were not the responsible team.  
10:58 15 During this point he was most emphatic  
16 that the investigation of Milgaard was a  
17 thorough investigation and that all the  
18 spurious statements made by Walsh and  
19 Asper do not shake his belief that  
10:58 20 Milgaard was responsible for the murder  
21 of Gail Miller. He interjected that he  
22 had gone to his Commission and wanted  
23 them to counter the statements being  
24 made but that the Commission would not.  
10:58 25 He felt that there was an unjust attack



1 on his administration that was not being  
2 answered. He further said that the  
3 implications that there was a cover-up  
4 and as much as sabotage of the files was  
10:58 5 so much garbage. Going back to the time  
6 of the investigation and trial the case  
7 was so conclusive that once the  
8 conviction was registered he was  
9 satisfied that all appeals would be  
10:59 10 successful also."

11 And is that, was that a fair account of what you  
12 would have told Mr. Graham or what you would have  
13 thought at the time, Mr. Penkala?

14 A Yes.

10:59 15 Q If we could just go back, he talked here about you  
16 had gone to the:

17 "... Commission and wanted them to  
18 counter the statements being made but  
19 that the Commission would not."

10:59 20 What does that relate to? And, I'm sorry, that:

21 "He felt that there was an unjust attack  
22 on his administration that was not being  
23 answered."

24 A My principals were the, it was the Saskatoon Board  
10:59 25 of Police Commissioners, and that was in reference



1 to them, and I had approached them on the basis of  
2 these comments that were circulating and asked  
3 them if they were prepared to do anything about  
4 it, and they didn't.

10:59 5 Q Did you feel that there should be something to  
6 counter the statements being made?

7 A Well, to be quite honest, I didn't know what, what  
8 approach should be taken, but I thought that  
9 possibly maybe, maybe they could have entertained  
11:00 10 some legal minds to see how that could be dealt  
11 with, or maybe not dealt with at all.

12 Q And then you say:

13 "He further said that the implications  
14 that there was a cover-up and as much as  
15 sabotage of the files was so much  
16 garbage."

17 And is that your view today, sir, as well?

18 A Basically, yes. I was constantly of the opinion  
19 that the investigation was as thorough as it could  
11:00 20 possibly be, that a conviction was obtained, I  
21 learnt that an appeal had been filed and the  
22 appeal was dismissed, and I was, of course,  
23 satisfied that what was done and carried out was  
24 right.

11:01 25 Q Just scroll down to the bottom, please. It says:



1 "One of the points that  
2 Penkala made was that while he was in  
3 charge of Identification he had heated  
4 arguments with the officer in charge of  
11:01 5 Detectives over the fact that some teams  
6 got all the work and there was no  
7 communication between members."

8 Do you recall saying that to Mr. Graham at the  
9 time?

11:01 10 A Not specifically. I think, I think probably that  
11 question was posed, but I just --

12 Q Can you --

13 A -- I just don't see myself answering it in that  
14 fashion.

11:01 15 Q Is this something you would have thought at the  
16 time?

17 A Well there is always, there is always some, some  
18 indication that there is dissatisfaction between  
19 members but, you know, it's not, it's not a  
11:01 20 general thing that affects the operations. You  
21 will always have differing views between members  
22 of investigative teams.

23 Q Do you recall having heated arguments with the  
24 officer in charge of detectives?

11:02 25 A No, I -- that is -- I -- that is just not



1 consistent with what my thoughts are.

2 Q Go to the next page, please. It goes on to say:

3 "He said that this was  
4 recognized as a fault and that when he  
5 became chief he brought the Detectives  
6 and Uniform under one deputy to increase  
7 communication."

8 And is that something that you said to  
9 Mr. Graham?

10 A Umm, there's -- that could have been suggested  
11 because we did, we did proceed in that, in that  
12 particular fashion. We eventually made the  
13 accountability of both the uniform division and  
14 the detective division responsible to one, one  
15 executive officer.

16 Q Then call up 004286, and this is a *Globe and Mail*  
17 article of December 7th, 1991 and I believe, Mr.  
18 Penkala, this was after Justice Minister Kim  
19 Campbell had ordered a reference to the Supreme  
20 Court of Canada, and it's talking about Karst and  
21 Nordstrom interviewing Fisher. And then -- I'm  
22 sorry, if you could just scroll down -- and it  
23 says, quote:

24 "'There's no conspiracy, that  
25 I can assure you,' concurred retired



1                   Saskatoon police chief Joseph Penkala,  
2                   who was also one of the original  
3                   Milgaard investigators.

4                   Mr. Penkala called the missing  
11:04 5                  files 'a tempest in a teapot. We kept  
6                  all the important cases. Why do you  
7                  think that a complete file on Milgaard  
8                  is still together? It's more serious  
9                  than the rapes reported at the time.'

11:04 10                And did you recall making statements to that  
11                effect to the media in December of 1991?

12            A            I don't have recollection. I was already retired,  
13            but I certainly could have made that statement,  
14            yes.

11:04 15            Q            And just this comment here suggesting that the  
16            Milgaard, or the murder file was more serious than  
17            the rape files, was that -- or do you recall  
18            saying something like that?

19            A            Not specifically, but -- but --

11:05 20            Q            Would --

21            A            -- the generalities of it, I -- you know, if I  
22            said it in that particular fashion it would be  
23            that murder is far more serious than rape, even  
24            though rape is a serious offence.

11:05 25            Q            Would it be more likely that the police would keep





1 a murder file than a rape file?

2 A Well I think, I think if the file is not solved,  
3 both files would be kept.

4 Q A solved murder file?

11:05 5 A If it's a not-solved file both files would be kept  
6 until they were solved; if they were solved and  
7 there was a perpetrator assigned to that  
8 particular file then at that point, obviously, the  
9 file could be concluded and eventually removed  
11:05 10 from the system.

11 Q If we could go to 324970, and this is a letter of  
12 April 17th, 1991 from you to a Mr. Clarence  
13 Garvie, and do you recall exchanging  
14 correspondence with a Mr. Garvie about the  
11:06 15 Milgaard matter?

16 A Yes.

17 Q And I won't bring up his letters -- actually,  
18 maybe I'll just call them up for the record, I'm  
19 sorry. First is 077711, and this is a letter of  
11:06 20 March 28th, 1991 from Mr. Garvie that -- where he  
21 expresses his opinion about David Milgaard and  
22 Larry Fisher, and I think -- just scroll down a  
23 bit -- it just says:

24 "He is a better suspect than David  
11:07 25 is!!!!"



1 And then if you could call up 324969, and again  
2 it's a second letter to you from Clarence Garvie  
3 and again raises issues about the Milgaard  
4 matter.

11:07 5 If we could go back to 324970,  
6 and again at this time, April 17th, '91, you  
7 would still be on duty as chief; is that correct?

8 A Yes.

9 Q And call out the first paragraph, please, and you  
11:07 10 say, starting in the second line:

11 "I must identify that too many people  
12 have been influenced by the one-sided,  
13 controversial media reporting on the  
14 Milgaard matter. I'm disappointed that  
11:07 15 the media is not more objective and  
16 would not seek to report the facts as  
17 opposed to innuendos which introduced  
18 controversy and incited the compassion  
19 of many people who are not acquainted  
11:07 20 with the true facts of the incident."

21 And I'm wondering if you can tell me, what are  
22 you referring to, are you able to tell us about  
23 the innuendos and controversy?

24 A Well, we reviewed some newspaper clippings, those  
11:08 25 -- that would be the substance that's being



1 referred to in generalities, and I felt obligated,  
2 after receiving a second letter, to respond to  
3 them and give them an impression of where I stood  
4 on the issue.

11:08 5 Q And if we can scroll down to the next paragraph,  
6 you say:

7 "My purpose is to assure you that I am  
8 firmly convinced that David Milgaard was  
9 the person who murdered Gail Miller and  
11:08 10 that he was convicted by a competent  
11 court and a jury of twelve men and  
12 women. The conviction was based on  
13 factual evidence which stood the  
14 credibility of the convicting court and  
11:08 15 the Saskatchewan Court of Appeal. The  
16 conviction also withstood the  
17 examination for appeal to the Supreme  
18 Court of Canada and most recently, the  
19 examination by the Federal Minister of  
11:08 20 Justice. I believe that if we have any  
21 faith in democracy and our Canadian  
22 judicial system, the process has  
23 established his guilt beyond a doubt."

24 And I believe the examination by the Federal  
11:09 25 Minister of Justice would have been Kim Campbell,



1 I think it was February 28th, 1991, where she  
2 rejected Mr. Milgaard's application for review.

3 Is that what you are referring to?

4 A I would think so, yes.

11:09 5 Q And that was your view at the time as expressed in  
6 the letter to Mr. Garvie?

7 A Yes.

8 Q Scroll down to the bottom, please, you say:

9 "It is regrettable that citizens can be  
11:09 10 misled by controversial journalism  
11 causing them to lose faith in the  
12 integrity of their justice system which  
13 is recognized as the best in the world."

14 And again, the controversial journalism, is there  
11:09 15 anything that you are referring to there that you  
16 have not already pointed to?

17 A No, just in general.

18 Q If we could go to 106877 and this is a letter from  
19 Carl Karp to you dated April 18th, 1991 and  
11:10 20 Mr. Karp writes in the letter that he's writing a  
21 book about the murder of Gail Miller. Do you  
22 recall getting this letter from Mr. Karp?

23 A Yes.

24 Q And I'll just call out this part, please, and he  
11:10 25 says:



1 "Now that the investigation is over, and  
2 now that the Saskatoon Police Department  
3 has been totally exonerated in the job  
4 that they did, I am hoping that you will  
11:10 5 be able to assist me in gathering  
6 information for the book. This book, I  
7 hope, will be the definitive story  
8 concerning the Gail Miller murder. It  
9 will be a book that deals with fact  
11:11 10 rather than innuendo.

11 Specifically, Chief, I'm not  
12 looking so much for information, but for  
13 colour. By that I mean that I have a  
14 good understanding of the information  
11:11 15 concerning the investigation, what I'm  
16 missing is the difficulty the police  
17 faced in conducting such a thorough  
18 investigation. For example, it would  
19 greatly assist me if you could provide  
11:11 20 me with copies of the police reports  
21 written during the investigation - of  
22 course, you could white out or delete  
23 any names or information you consider  
24 confidential."

11:11 25 How did you respond to this request, Mr. Penkala?



1 A Well, I couldn't respond to his requests at all.  
2 I basically ignored that. I believe he phoned me  
3 after that if I recall correctly, but I simply was  
4 not going to be involved with that and that's the  
11:11 5 last of heard of it.

6 Q And was there a reason that you wouldn't give him  
7 the information he asked for?

8 A Basically it's the same reasons that have been  
9 projected here, is that we have a responsibility  
11:12 10 to protect the names and the people involved in  
11 the files and I don't think there is any purpose.  
12 Anything that was public would certainly be  
13 available to this author and he could have  
14 received it through other sources.

11:12 15 Q Call up 004289, please. This is an article  
16 November 30th, 1991 and the first paragraph, just  
17 to give some context, says:

18 "News that his 22-year-old murder  
19 conviction will be reviewed by the  
11:12 20 Supreme Court of Canada put David  
21 Milgaard in a buoyant mood Friday."

22 And it goes:

23 "The announcement by Justice Minister  
24 Kim Campbell does not make Milgaard a  
11:13 25 free man immediately."



1 It goes on to talk about that. If we can go back  
2 to the main page. I take it you would have  
3 become aware of that at or about the time, Mr.  
4 Penkala, that a review would be held?

11:13 5 A Yes.

6 Q And then it says:

7 "Former chief Joe Penkala, who was  
8 involved in the investigation as a young  
9 officer, said he supports a review but  
11:13 10 stands by the police handling of the  
11 case."

12 And is that an accurate accounting of what you  
13 would have said at the time?

14 A Yes.

11:13 15 Q And why did you support a review?

16 A Because of the ongoing consistent controversy that  
17 was carrying on. I felt that if there was a  
18 review, it may provide the information that would  
19 satisfy those persons that felt that there was  
11:13 20 something missing and something not done  
21 correctly.

22 Q And did you testify at the Supreme Court of Canada  
23 hearing?

24 A I did not.

11:14 25 Q Were you asked to testify?



1 A I was not called.

2 Q Were you contacted by anyone about giving evidence  
3 at that hearing do you recall?

4 A No.

11:14 5 Q I'll now call up 034603, please, and were you  
6 aware in 1993, Mr. Penkala, that the RCMP were  
7 asked to conduct an investigation into various  
8 matters relating to the David Milgaard matter?

9 A Yes.

11:14 10 Q And you recall interviewing with RCMP officers?

11 A They visited me at my home I believe, yes.

12 Q And if you could go to the next page, please, and  
13 this is, it appears to be March the 9th, '93, and  
14 it says:

11:15 15 "Penkala's involvement in the murder  
16 investigation was as an ident member.  
17 Beyond his sole involvement in the case  
18 as an ident member he recalls a  
19 conversation he and Short had with Wood.  
11:15 20 They were hashing over the  
21 investigation. That given their lack of  
22 success with Wilson and John, this  
23 suggestion was made that it might be  
24 worthwhile bringing Wilson and John to  
11:15 25 Saskatoon to talk to them further





1                   there."

2                   And does that record what you would have told the  
3                   officers at the time?

4           A           Yes.

11:15 5           Q           And is that the same incident you told us about I  
6                   think on Thursday, about you and Short talking to  
7                   Wood to convince him not to take Milgaard off the  
8                   table as a suspect?

9           A           Yes.

11:15 10          Q           And then page 034607, it just says here:

11                                "There was no interest in Fisher during  
12                                the investigation.

13                                        They were not advised of  
14                                Fisher's rape convictions."

11:16 15          Is that what you would have told the RCMP?

16          A           Obviously I did.

17          Q           Well, at the time of the investigation --

18          A           We didn't know about Fisher.

19          Q           Right.

11:16 20          A           So --

21          Q           And then to 034608, next page, it's written:

22                                "At the time of the rape investigation  
23                                there did not appear to be a system in  
24                                place to make sure that victims were  
11:16 25                                advised of file outcome."



1 Is that something you would have told the RCMP?

2 A Yes. That's somewhat general and abbreviated, but  
3 that we covered before, that if dispositions were  
4 in a local court within our jurisdiction, that was  
11:17 5 pretty well attended to, it was a routine type of  
6 deal, but if cases went beyond our jurisdiction,  
7 there was always a difficulty in getting back the  
8 dispositions to fulfil our requirements, and if  
9 Ottawa, and I'm talking about the central records  
11:17 10 system in Ottawa, was not aware where these  
11 offences had been initiated, they would not be in  
12 a position to send reminders that they needed a  
13 disposition on the case.

14 Q And dealing specifically but to the police  
11:17 15 advising the victim of the file outcome.

16 A Oh, victim, I'm sorry.

17 Q Yeah.

18 A That -- and I spoke to that before, I think it was  
19 kind of an individual investigator's call,  
11:18 20 although, as I said yesterday, as a young starting  
21 officer I recall in very minor cases your file  
22 would get returned to you simply because you made  
23 no effort to contact the complainant and advise  
24 that complainant of what had progressed to that  
11:18 25 point.



1 Q In 1970 and '71 were you aware of any system in  
2 place at the Saskatoon Police Service to make sure  
3 that victims were advised of file outcome?

4 A Nothing other than that's the reasonable and  
5 sensible approach to investigations.

11:18

6 Q But would it be left up to, I think you said was  
7 it left up to the investigating officers to do  
8 that task?

9 A Yes.

10 Q Go to the bottom of that page, please, and it says  
11 at the bottom:

12 "That Karst was not convinced at first  
13 that Milgaard was responsible."

14 Do you recall saying that to the RCMP?

15 A Yes. I think at some point I was aware that  
16 Detective Karst was of that opinion and I think it  
17 had to do with his initial contacts with Wilson  
18 and John.

11:19

19 Q And so you recall a discussion with Karst about  
20 that?

11:19

21 A I don't think I ever had a discussion with Karst  
22 about that. I somehow was aware that that had  
23 occurred.

24 Q And then scroll down to the bottom, please, and it  
25 says:

11:20



1 "Had attended at least 100 death scenes  
2 prior the Miller case. This came up as  
3 a comment had come to Penkala's  
4 attention that the Miller scene was one  
11:20 5 of his first."

6 And do you recall discussing that with the RCMP?  
7 A I probably did. I think it was probably in  
8 reference to some of the controversial comments  
9 that were being bandied around through the media.

11:20 10 Q Do you recall reading somewhere that the Gail  
11 Miller scene was one of your first murder scenes  
12 or death scenes?

13 A Not specifically, but obviously there was  
14 something that was said.

11:20 15 Q And is it accurate that you had attended at least  
16 100 death scenes prior to the Miller case?

17 A Well, I know in 1969 I attended three murders and  
18 one attempted murder.

19 Q And again, this 100 death scenes prior to the  
11:21 20 Miller case, you would have been on the force for  
21 18 years?

22 A I spent I think about 12 years in actual ident and  
23 I think it would be -- well, it's mentioned as  
24 death scenes, so it's not necessarily murders, but  
11:21 25 we would get assigned to go to sudden deaths, we



1 called them sudden deaths even though a person  
2 died of natural causes, until that was established  
3 we would be asked to go to those scenes and  
4 perform those types of recordings that would  
11:21 5 substantiate what had actually taken place.

6 Q If we could call up 035599, please, and it looks  
7 like this is a follow-up call with the RCMP, June  
8 9th, 1993, and I believe this is where they talked  
9 to you about the, that five page document that we  
11:22 10 spent some time on the summary where you drew the  
11 map on the back. Do you know which document I'm  
12 referring to?

13 A Oh, yes, yes.

14 Q And just for the record, that is 006799 and that's  
11:22 15 the four pages summarizing file contents, the  
16 fifth page being a summary of theories, facts,  
17 etcetera, and on the back of that was a map you  
18 drew; correct?

19 A That's correct, yes.

11:22 20 Q And the RCMP had some questions for you and it's  
21 reported here:

22 "- he recognized the writing on the back  
23 of the summary (on the map) as his. He  
24 does not recall preparing the sketch but  
11:23 25 feels he did it as well."



1           So I take it you would have told the RCMP that at  
2           the time?

3           A           Yes.

4           Q           And the next page, please, it says:

11:23 5                       "- he stated he and Det. Short went into  
6                       the O/C Criminal Operations officer,  
7                       Supt. Wood, and discussed the file and  
8                       brainstormed."

9           And again, is that what you've already told us  
11:23 10           about?

11          A           Yes.

12          Q           And then it's reported you said:

13                       "- he felt that the contents of the  
14                       summary were a result of the  
11:23 15                       brainstorming and done in an effort to  
16                       determine what they had and in which  
17                       direction they should go - then making  
18                       some suggestions; and was part of  
19                       routine investigational technique."

11:23 20           Is that something you would have told the RCMP?

21          A           Yes.

22          Q           And to 095602. Sorry, 035602. And again this is  
23           just continuing on with this interview, it says:

24                       "As far as the points listed on the  
11:24 25                       summary, he said this type of approach



1 was common in larger files. He stated  
2 he recalled he and Short going into Jack  
3 Wood's office and discussing the file  
4 how they should be channeling their  
11:24 5 efforts and what further action is  
6 required. It was just a matter of  
7 brainstorming and bouncing ideas around  
8 and making suggestions according to Mr.  
9 Penkala. He said they never consider  
11:24 10 fabricating any type of witness can say  
11 evidence."

12 And do you recall what that response or that  
13 comment was in relation to, Mr. Penkala?

14 A It would be in response to that five page which  
11:25 15 included a summary, and of course we have to  
16 recognize that this is the interpretation of that  
17 officer that was interviewing me, but in  
18 generalities, that's the kind of conversation that  
19 was carried on.

11:25 20 Q Was there, were you aware of a suggestion or an  
21 allegation that that five-page summary was, it  
22 says here, used to fabricate or coerce subsequent  
23 witness statements or evidence?

24 A I'm sure that that was raised. I don't have a  
11:25 25 specific recollection of it other than what is



1 interpreted by that officer.

2 Q Were you aware as to whether that five page  
3 summary document was used at all in the interviews  
4 and taking statements from either Ron Wilson or  
11:26 5 Nichol John?

6 A I have no knowledge of that. I should point out  
7 too that I think somewhere along the lines in this  
8 taking of this, these notes from me, there was a  
9 suggestion that I had admitted that I did prepare  
11:26 10 some of that and my recollection is that I was  
11 always in doubt. Although I was familiar with  
12 what was there, I was never convinced that it was  
13 my authorship of those particular things.

14 Q Now, when you met with the RCMP, do you recall if  
11:26 15 they asked you if you had any notebooks or file  
16 documents?

17 A I don't recall whether that was asked of me or  
18 not. I would have readily admitted that I did.

19 Q Pardon me?

11:27 20 A I would have readily admitted that I had if they  
21 asked.

22 Q And the fact that there doesn't -- let me put it  
23 this way. You gave us two binders of documents  
24 that you had kept in your possession; is that  
11:27 25 right?





1 A Yes.

2 Q And maybe just tell us again how those came to be  
3 in your possession over the years?

4 A Yes. In regards to serious cases such as the  
11:27 5 Miller murder file, involvement in that case,  
6 personal involvement in that case, I would retain  
7 copies of my reports and keep it in a file jacket  
8 in the ident section, and over the years that  
9 would remain and it would be -- there would be  
11:27 10 assurance that original copies were on the main  
11 file, I would keep that, and in this particular  
12 case where the controversy started to arise, I  
13 simply collected that and took it with me when I  
14 retired and left the police force.

11:28 15 Q So in 1991 when you retired, that file folder of  
16 documents you took with you?

17 A Yes.

18 Q Were there any files relating to any other cases  
19 that you would have taken with you as well do you  
11:28 20 recall?

21 A There probably were some other because I was in  
22 the habit of retaining copies for my own benefit  
23 so that I didn't always have to go search or  
24 request it from central records or wherever else.  
11:28 25 Some of them were administrative things as well.



1 Q So the documents in your file folder that you took  
2 in 1991, did you have reason to believe then that  
3 the originals of all those documents were on  
4 police files?

11:29 5 A Yes.

6 Q And how did you know that?

7 A Because there were reference numbers indicating  
8 that there was a file number and my copies were  
9 very specifically identified carbon copies or  
11:29 10 photocopies.

11 Q And before you put such a document in your file  
12 folder, would you be certain then that another,  
13 that the master or another copy of that existed  
14 elsewhere in the police files?

11:29 15 A Not specifically. It was really -- I didn't feel  
16 that it was my responsibility. I would forward  
17 the original copy to central records and with  
18 assurance that that would be attended within that  
19 department.

11:29 20 Q When you retired in 1991 and took this file folder  
21 with you, did you have a belief or understanding  
22 that other copies or originals of all of those  
23 documents would be somewhere else on the police  
24 files?

11:30 25 A Yes.



1 Q And when you met with the RCMP, did you -- is  
2 there any reason you didn't volunteer and give  
3 those documents to the RCMP?

4 A No reason really. The visit and the inquiries  
11:30 5 that were made at that time really weren't that  
6 specific and it was probably after that that I  
7 went to this file where the copies were loose and  
8 at some point after that I started to organize it  
9 and put it in a binder.

11:30 10 Q When did you first become aware that documents in  
11 your file folder, that copies of some of those  
12 documents are not in the records of any other  
13 party to this Commission, including the city  
14 police?

11:30 15 A I was really never aware that some of those copies  
16 were not in the original files.

17 Q So would it be fair to say that when you turned  
18 them over to us and we identified to you that we  
19 didn't have some of those, would that be the first  
11:31 20 time that you became aware?

21 A Yes, yes, yes.

22 Q And had you been aware sooner that you had copies  
23 of documents that did not appear to exist  
24 elsewhere, had you known of that earlier would you  
11:31 25 have done something with those documents?



1 A Obviously if they were of significance, yes.

2 Q If we could call up 077566, please, and this is a  
3 *StarPhoenix* report, July 19th, 1997, shortly after  
4 the DNA test was completed, and if you go to the  
11:31 5 next page, please, and it's reported here, it  
6 says:

7 "Joe Penkala, the Chief of Police from  
8 1982 to 1992, investigated Miller's  
9 death in 1969. Penkala, who has always  
11:32 10 vehemently maintained Milgaard is  
11 guilty, was bewildered by Friday's  
12 results. 'God knows how this could have  
13 happened. I don't know. I just don't  
14 know'."

11:32 15 Do you recall having a discussion of that nature  
16 with a reporter?

17 A Vaguely, yes.

18 Q And can you tell us what you were referring to  
19 then at the time when you made that comment?

11:32 20 A Well, I think it's self-explanatory, I was always  
21 of the opinion that the evidence supported the  
22 conviction of Mr. Milgaard and under the  
23 circumstances, when the DNA and the end result of  
24 the investigation exonerated Mr. Milgaard, that  
11:33 25 was somewhat of a shock to me.



1 Q And I understand, sir, that you testified at the  
2 preliminary hearing and trial of Larry Fisher; is  
3 that correct?

4 A Yes.

11:33 5 Q And you were called as a witness by the Crown in  
6 that case?

7 A Yes.

8 Q If we could call up 315660, please, and this is  
9 the transcript, I don't propose to go through most  
11:33 10 of it. If you could go to page 315706 and you are  
11 being cross-examined, this is at the preliminary  
12 hearing, by Mr. Beresh, and he asks:

13 "Q You didn't at any time observe what  
14 appeared to you, as a senior police  
11:34 15 officer, to be bite marks; is that  
16 correct?

17 A I have no recollection or any record  
18 that there were bite marks.

19 Q But I take it you would have recorded  
11:34 20 that if you had seen it?

21 A Oh, certainly.

22 Q That would be fairly relevant in your  
23 investigation?

24 A That's right."

11:34 25 Do you recall that exchange at the Fisher prelim?



1 A Vaguely, yes.

2 Q And the subject of bite marks on the body of Gail  
3 Miller, was that something that you looked at at  
4 the time in 1969?

11:34 5 A Obviously the victim would have been examined for  
6 that, not only by myself, there was also the  
7 pathologist, he would have also examined for that.  
8 I'm -- you know, I'm certain that a pathologist  
9 would also do that.

11:34 10 Q And I think what Mr. Beresh was questioning you  
11 on, saying if you would have observed bite marks,  
12 you would have made a note of it?

13 A Yes.

14 Q And the fact that there's no note, would it be  
11:35 15 fair to say that you wouldn't have observed any  
16 bite marks?

17 A That's right.

18 Q And I believe there's one photograph that relates  
19 to this that may have been put to you at those  
11:35 20 proceedings, it's 066732, and if we could just  
21 zoom in that area, please. I'm not sure if you  
22 can see that very well, but I believe that was a  
23 mark that, from a photograph that was being viewed  
24 by some as a bite mark. Were you ever shown that  
11:35 25 photograph, do you recall, at the Fisher



1 proceedings?

2 A Other than the questioning that was in the  
3 evidence as was taken from me, I have no  
4 recollection of the suggestion that there was any  
11:35 5 marks to relate to the questions that I was asked.

6 Q And again it's difficult from this photograph, but  
7 is that something that might cause you as an ident  
8 officer to take a closer look at to identify what  
9 it might be?

11:36 10 A Oh, I think if you were looking at something and  
11 didn't recognize it, that notation would have been  
12 made, yes.

13 Q And again looking at this now, sir, is that  
14 something that would, based on that photograph and  
11:36 15 that mark, is that something that would cause you  
16 as an ident officer to make a note of or to follow  
17 up on?

18 A I'm not so certain that I would have that much  
19 faith in a photograph. It seems to be awfully  
11:36 20 grainy and not very sharp.

21 Q Fair enough. At the time when you were involved  
22 in the autopsy, I think you are telling us you did  
23 not observe anything what appears to be a bite  
24 mark?

11:36 25 A That's correct.



1 Q Take that photograph down, thanks.

2 COMMISSIONER MacCALLUM: The media is  
3 reminded of the publication ban.

4 Q MR. HODSON: Yes. I should point out that  
11:37 5 there was previously a publication ban of the  
6 autopsy photographs that would apply to the  
7 photograph that was just on the screen.

8 Again if we can call up 314019,  
9 please, and this is the transcript of your  
11:37 10 evidence at the Larry Fisher trial; is that  
11 correct, Mr. Penkala?

12 A Yes.

13 Q And I don't propose to go through any of that.

14 COMMISSIONER MacCALLUM: Did you say at the  
11:37 15 preliminary?

16 MR. HODSON: No, sir, that's actually at  
17 the trial.

18 COMMISSIONER MacCALLUM: The trial?

19 A The trial, yes.

11:38 20 BY MR. HODSON:

21 Q I'll now just turn, Mr. Penkala, to your  
22 collection of documents, and, Mr. Commissioner, we  
23 had previously, when we received these documents,  
24 scanned them, disclosed them to all the parties  
11:38 25 and identified those documents that we did not





1 already have in our database from another source,  
2 and I just propose to go through some of those  
3 this morning to get a sense of where they may have  
4 come from, and the first one is 324671, or  
11:38 5 actually, I'm sorry, 324655, please, and this  
6 document is a February 1st, 1969 report, it's your  
7 report and I see it's got at the top ident, and  
8 can you tell us when and where and how you would  
9 have received this document?

11:40 10 A Yes, when this document was typed up my copy was  
11 marked 'ident' and then returned to the ident  
12 section.

13 Q So, and I think you told us previously that these  
14 reports were prepared with four copies, is that  
11:40 15 right, three or four copies?

16 A Generally, yes.

17 Q And that the author of the report would always get  
18 one copy back for their own files?

19 A Not necessarily the author, but -- although it  
11:40 20 would be available to the author if he so chose,  
21 but to the unit or the --

22 Q Oh, okay.

23 A -- or the, the service department that was  
24 involved.

11:41 25 Q So this report would have got put on the master



1 file, a copy of the report would have gone to the  
2 detectives, --

3 A Yes.

4 Q -- and a copy back to you?

11:41 5 A Yes.

6 Q And then you kept that in your folder; is that  
7 right?

8 A Yes, or a copy of it.

9 Q Or a copy?

11:41 10 A Because I, often I would recopy some of that to  
11 ensure that there was sufficient copies for the  
12 other investigators that were involved in that  
13 particular file.

14 Q If we could then go to 324671, please. And I had  
11:41 15 touched on this earlier, this is a March 18th, '69  
16 letter to the RCMP lab, it's got the  
17 (V1)-/(V2)----- file numbers; can you tell me when  
18 and how you would have got a copy of this letter?

19 A I have no idea, other than I had authored the  
11:42 20 instructions on March the 18th, and I would have  
21 kept a carbon copy of that for my file.

22 Q And so where else would copies of this letter have  
23 gone at the time?

24 A It would have gone to the two files that are  
11:42 25 listed at the top because they are referenced to



1 the rape files in 1968, and they would go back to  
2 central records, those copies go to central -- the  
3 originals would go to central records.

4 Q Okay. And 324672, please. And again this, I  
11:42 5 touched on earlier, is an April 1, '69 report from  
6 the lab, you will see the received stamp of the  
7 Saskatoon Police Department; correct?

8 A Yes.

9 Q And I think you told us that's your writing where  
11:43 10 you would have written the occurrence numbers?

11 A Yes, tying it to those two, two rape files that  
12 occurred in '68.

13 Q So would this document, then, have gone onto those  
14 files then?

11:43 15 A I would assume that what happened is the original,  
16 the original report would have went directly to  
17 central records, and then they would have provided  
18 the copy that came to the ident section, and I  
19 included the occurrence numbers so that I could  
11:43 20 reference to those occurrence numbers. I don't  
21 know for sure but I believe that the  
22 correspondence coming back from the laboratory was  
23 in double or triplicate copies.

24 Q If we can go to 324745, please, and are you able  
11:44 25 to tell us what this document is?



1 A It looks as though it's one of the preliminary  
2 descriptions of the identification of the crime  
3 that occurred on January the 31st.

4 Q Was this a media release or are you able to tell?

11:44 5 A I, I don't really know, I -- it might have been an  
6 internal, just simply an internal, internal,  
7 internal memo. At that stage I would have not had  
8 too much to do with the media so I, I suspect that  
9 this would have been more of an internal  
11:45 10 information sharing.

11 Q If I could call up 324810, please, and if we can  
12 just zoom in on that area; are you able to tell us  
13 what this document is?

14 A It appears to be one of those memos that come back  
11:45 15 from central records in Ottawa requesting an  
16 update on the, on the disposition of a file. This  
17 copy is very difficult to read.

18 Q I think it says here:

19 "Note: If item 9 is completed enclose  
11:45 20 this card in an envelope for return."

21 And item 9 is name and a person arrested or  
22 suspected, and this is blank, although it does  
23 have the Gail Miller number at the top right;  
24 correct?

11:46 25 A Yes, yes it does, yes. It's obviously, it's



1 obviously a form from the records department in  
2 Ottawa.

3 Q Okay. If we can go to 324813, please. If we can  
4 just turn that over, please. And, again, is this  
11:46 5 part of that same card system?

6 A It appears that way. I -- I'm not sure. Umm,  
7 sometimes when we sent exhibits by post we asked  
8 for an AR card, and I'm not sure if that's an AR  
9 card. It was a means of advising the sender that  
11:47 10 it had been received.

11 Q I'll call up --

12 A I'm not certain --

13 Q Sorry?

14 A I'm not certain that that's what it is.

11:47 15 Q Yeah. 324814, please, and just turn that over.  
16 Again, would this be a document that would have  
17 been used for you to report to the Crime Index?

18 A Yes.

19 Q There were also, on -- in the files -- and I'll  
11:47 20 call up 324845, please -- and a series of  
21 photographs. And they were actually original  
22 black and white photographs, I believe, taken of  
23 Gail Miller's funeral; is that correct?

24 A Yes, that's what --

11:47 25 Q Yes?



1 A That's how I interpret those, yes.

2 Q And I don't propose to go through any of the  
3 photographs but, again, can you tell us how that  
4 set of photographs would be -- would come to be on  
11:48 5 your file?

6 A I don't know specifically. They did show up, I --  
7 there was an indication that it was an RCMP  
8 process, and that makes sense because it was out  
9 of our jurisdiction, so obviously an RCMP  
11:48 10 photographer probably was present at the funeral  
11 and these photographs were provided to the  
12 Saskatoon Police Department.

13 Q And do you know if other copies were located on  
14 any other files of the police service?

11:48 15 A I don't know.

16 Q If we could go to 324888, please, and just turn  
17 that over, please. Again, this is a document from  
18 your file, Mr. Penkala; is that your handwriting?

19 A Yes.

11:49 20 Q And it's got Sex Offenders 1940 + Younger.

21 A Yes.

22 Q I presume, in 1969, that would put them at 29  
23 years of age and younger. Can you tell us what  
24 this, what this document is?

11:49 25 A Umm, this was the process where we were examining



1 sex offenders that we were aware of in regards to  
2 the Miller murder and, I guess, hoping that we  
3 would have some indication of suspects that could  
4 be examined for the Miller murder.

11:49 5 Q And would this have been something you prepared at  
6 the time of the investigation in 1969?

7 A Yes.

8 Q And what are the numbers on the left-hand side;  
9 what do they relate to?

11:50 10 A Those are the, those are the criminal numbers, the  
11 -- they are referred to as FPS numbers,  
12 fingerprint system numbers, and every person  
13 that's registered in Ottawa in the criminal  
14 records section is assigned a national number, and  
11:50 15 that's what -- now I, now I have to -- no, that's  
16 -- I have to withdraw.

17 Those numbers are our numbers,  
18 those are numbers of the Saskatoon Police  
19 Department, but there is a numbering system as  
11:50 20 well when convicted criminals are recorded in  
21 Ottawa. These numbers are our numbers, they are  
22 RC -- or Saskatoon Police numbers, we assign our  
23 own numbers, but there is a national number that  
24 eventually gets assigned.

11:50 25 Q Thanks. That's all for that document. Just a



1 couple of questions to close here, Mr. Penkala.  
2 And we've touched on most if not all of this area  
3 about the role you played but I'll ask you this;  
4 what role did you play in the decision to pursue  
11:51 5 David Milgaard as a suspect in the murder of Gail  
6 Miller?

7 A My role was to contribute anything that I possibly  
8 could generally, and most basically as the scene  
9 attendance, and then I was taken into confidence  
11:51 10 on -- on reviewing the circumstances and the facts  
11 that we had and being involved in some of the --  
12 in the theories that were being presented.

13 Q What role did you play in the decision to charge  
14 David Milgaard with the murder of Gail Miller?

11:51 15 A I was not involved in that one specifically, and  
16 I'm -- I'm suggesting, I'm thinking you are  
17 meaning the specific --

18 Q Yes?

19 A -- involvement? None at all.

11:51 20 Q And, again, back at the time, 1969, did you have a  
21 belief at that time about David Milgaard's  
22 responsibility for the murder of Gail Miller?

23 A Eventually, yes.

24 Q And what was that belief?

11:52 25 A My belief is that the circumstances and the





1 evidence that we had did suggest that David  
2 Milgaard was involved in the murder of Gail  
3 Miller.

4 Q And what basis did you have for this belief?

11:52 5 A Well there was a number of issues, and some of  
6 those were not my specific identifications, these  
7 were -- these are, these are things that I learnt  
8 through the thing; the presence of David Milgaard,  
9 Ron Wilson, and Nichol John on the morning of the  
11:52 10 31st of January, 1969; the explanations that were  
11 found in the statements of Wilson and Nichol John;  
12 umm, the general circumstances surrounding the  
13 entire investigation; their visit to the address  
14 across from St. Mary's School; the finding of Gail  
11:53 15 Miller's identification on the street in front of  
16 that, generally in front of that address; the  
17 comments of and the evidence of Mr. Cadrain; those  
18 were all issues that contributed to the belief  
19 that David Milgaard was responsible.

11:53 20 Q One of the mandates of this Commission of Inquiry  
21 is to inquire into the conduct of the  
22 investigation into the death of Gail Miller. As  
23 you know, Larry Fisher has been convicted of the  
24 rape and murder of Gail Miller and the Government  
11:54 25 of Saskatchewan has exonerated David Milgaard and



1 declared him to be factually innocent of this  
2 crime. If you look back at your role, Mr.  
3 Penkala, in the investigation into the death of  
4 Gail Miller, is there anything that you believe  
11:54 5 you could have or should have done differently?

6 A I have, I have, since I have been asked to attend  
7 here and thought about this, I can't think of  
8 anything that I could have done differently.

9 Q If you look back at the original police  
11:54 10 investigation in its entirety and not just your  
11 role, and based upon your observations or personal  
12 knowledge of the investigation, what do you think  
13 could have or should have been done differently?

14 A Again, I don't -- with my understanding, and it's  
11:54 15 not total, but with my understanding of the facts  
16 and the circumstances I, I again, I don't think I  
17 could have come to any other conclusion and I  
18 would have con -- did exactly what I did.

19 Q Okay. Thank you, Mr. Penkala, those are all my  
11:55 20 questions.

21 I think it's an appropriate spot  
22 to break, Mr. Commissioner, for lunch before  
23 cross-examination. There's just one item about  
24 there is a list here that I should ask for a  
11:55 25 publication ban on, and that would be the last



1 document that I turned up, on 324888. And I'm  
2 wondering, again, whether I could ask for a  
3 publication ban on that? Again, it contains names  
4 of suspects, I'm not sure that that is something  
11:55 5 that ought to be or that's necessary to be in the  
6 public domain.

7 COMMISSIONER MacCALLUM: They were sex  
8 offenders who had been convicted, are they, is  
9 that the nature of the list?

11:56 10 A Yes, yes.

11 MR. HODSON: Oh, I thought he had said they  
12 were -- were they convicted or suspects that you  
13 had fingerprints and photographs of?

14 A No, they were sex offenders that were convicted.

11:56 15 MR. HODSON: Oh, I'm sorry.

16 COMMISSIONER MacCALLUM: Well it might be  
17 in the public domain but I would see no need for  
18 its publication at this time anyway, irrespective  
19 of whether it is in the public domain, so for our  
11:56 20 purposes it can remain confidential and there  
21 will be a publication ban.

22 MR. HODSON: Thank you. That would be it  
23 until 1:30.

24 (Adjourned at 11:56 a.m.)

01:30 25 (Reconvened at 1:30 p.m.)



1 MR. HODSON: Mr. Commissioner, if I could  
2 just clarify one matter from this when I was  
3 examining Mr. Penkala about the bite mark  
4 evidence at the preliminary hearing. The record  
01:31 5 reflects that at the trial of Larry Fisher there  
6 was no evidence about the bite mark and it was  
7 ruled inadmissible at a *voir dire* and I had just,  
8 I think we had heard evidence earlier about that,  
9 but I just wanted to clarify that the bite mark  
01:32 10 reference was only at the preliminary hearing,  
11 but it was not evidence at the trial of Larry  
12 Fisher.

13 COMMISSIONER MacCALLUM: Okay.

14 MR. HODSON: And then secondly, as far as  
01:32 15 the order of cross-examination, I think counsel  
16 have agreed that Bruce Gibson will go first for  
17 the RCMP and that Mr. Lockyer has agreed to go  
18 second. After that I think that there is still  
19 some debate amongst counsel as to who goes third.  
01:32 20 I am told that Mr. Lockyer expects to be the  
21 afternoon with him, so we can do one of two  
22 things, we can either have counsel make their  
23 submissions now and sort out the order or we can  
24 let Mr. Gibson and Mr. Lockyer go and sort out  
01:32 25 the rest later. My only concern is that we had



1 earlier identified, at least as a general  
2 principle, that the cross-examination would be in  
3 groups, being the police groups, etcetera, and  
4 I'm not opposed to deviating from that if that's  
01:32 5 sort of how the counsel figure it out, but  
6 perhaps we can get some direction from you,  
7 Mr. Commissioner, as to whether we just plug on  
8 with the two today and try and sort it out  
9 tomorrow or how you wish to proceed.

01:33 10 COMMISSIONER MacCALLUM: Well, I suppose  
11 the effect of the evidence heard today might have  
12 a bearing on what people think about the order  
13 tomorrow, but generally speaking, I would prefer  
14 to see the group arrangement adhered to for the  
01:33 15 sake of avoiding repetitious questioning, but if  
16 that's impossible, we'll just do the best we can  
17 tomorrow, so let's hear from the two that are  
18 agreed to be heard today.

19 MR. HODSON: So Mr. Gibson, and again I  
01:33 20 just ask counsel to identify themselves and who  
21 they represent for Mr. Penkala.

22 COMMISSIONER MacCALLUM: All right.

23 **BY MR. GIBSON:**

24 **Q** Good afternoon, Mr. Penkala, my name is Bruce  
01:33 25 Gibson. As Mr. Hodson said, I am acting for the



1 RCMP and my questions will focus upon your  
2 interaction with the RCMP in 1969.

3 A Yes.

4 Q Again, I'm going to try and paraphrase some of  
01:34 5 your evidence and ask some questions about that.  
6 If I ever don't state your evidence accurately,  
7 please correct me, I'll try to do my best on that.

8 You mentioned that from your  
9 recollection in 1969, it was clearly a Saskatoon  
01:34 10 Police Service investigation and there was some  
11 assistance offered by the RCMP from Staff Sergeant  
12 Edmondson, Corporal Rasmussen and RCMP Inspector  
13 Jim Riddell?

14 A That was my understanding, yes.

01:34 15 Q And so again I believe your evidence was that the  
16 RCMP didn't take the lead on any of the issues,  
17 that they offered input, because it was obviously  
18 an SPS investigation?

19 A That's my understanding, yes.

01:34 20 Q So any of the exhibits that would be seized, any  
21 of the information that would be obtained, all of  
22 that would be managed by the Saskatoon Police  
23 Service; correct?

24 A You are referring specifically to the scene  
01:35 25 examination?



1 Q Yes, and I guess the investigation in 1969 and  
2 afterwards. Obviously Saskatoon Police Service  
3 were conducting an investigation into the death of  
4 Gail Miller and any information gathered in that  
01:35 5 process would be something that would be part of  
6 the SPS file management?

7 A Yes, I would agree with that, yes.

8 Q Now, one document I guess we should put up is the  
9 Riddell report, it's 250609, at 610, and I believe  
01:35 10 Mr. Hodson went through this document with you and  
11 it's a report that's authored by Inspector Riddell  
12 and it's dated May 21st of 1969 and again I  
13 believe your recollection was that you had seen  
14 that report before; is that correct, or you had  
01:36 15 not --

16 A Just before I was called to this hearing.

17 Q Okay. So your recollection is that you didn't  
18 review this report per se in 1969?

19 A No.

01:36 20 Q Okay. Now, if we look at the report, it may give  
21 us some information here about the RCMP  
22 involvement, and just to clarify sort of the  
23 number of man hours and time that was put in by  
24 the RCMP in 1969, that report, at the first  
01:36 25 paragraph there references Inspector Riddell's



1 involvement and it appears that he was involved  
2 commencing February 20th and through till April  
3 3rd. Now, the report does go on to mention a  
4 meeting of May 16th and then some contact with  
01:36 5 Detective Karst on May 20th, but from your  
6 recollection of Inspector Riddell's involvement,  
7 would you agree with me that it was very limited  
8 in the sense that it was here we have 11 days and  
9 then a couple of meetings after that?

01:37 10 A Yes.

11 Q And also if we go down to paragraph 2, if we want  
12 to just scroll down to that, right here it says:

13 "On 3 April 69 I personally met with the  
14 Chief of the Saskatoon City Police and  
01:37 15 advised him that this Force would be  
16 withdrawing S/Sgt. Edmondson and Cpl.  
17 Rasmussen from full-time assistance on  
18 this investigation."

19 And again does that ring true with what you  
01:37 20 recall about the limited involvement of the RCMP,  
21 where, as of April 3rd, 1969, there is no  
22 full-time involvement?

23 A Of course I wasn't party to that arrangement with  
24 the then chief of police, but in my mind and in my  
01:37 25 recollection it's consistent. There was a fall of





1 assistance from the RCMP at that point.

2 Q And again we're looking at a period of time when  
3 the RCMP join in at about February 20th, which is  
4 approximately three weeks after the death of Gail  
01:38 5 Miller, and as I mentioned, April 3rd, '69  
6 full-time involvement from Officers Edmondson and  
7 Rasmussen ends?

8 A Yes.

9 Q And that rings true with your recollection of  
01:38 10 their involvement?

11 A Yes.

12 Q And if we can go to the last page of this  
13 document, I guess it's 611, and we go down to the  
14 bottom there, if we can just pull that up, please,  
01:38 15 and again it's signed by Inspector Riddell and it  
16 looks like this was authored again on May 21st of  
17 '69 and he's got a diarization date there of June  
18 30th, '69, so it appears, and again correct me if  
19 your recollection is different, that the RCMP  
01:38 20 involvement was I guess not a day-to-day basis,  
21 because it looks like he diarized the file himself  
22 for over a month before he was going to go back  
23 and revisit that.

24 A That would be consistent with my observations.

01:39 25 Q I'm through with that document, thanks. If we



1           could put up another document, please, 250597, and  
2           again this was the Corporal Rasmussen report of  
3           May 7th of '69, if we can go to the next page, and  
4           again this is a little bit more of a lengthy  
01:39 5           document, but if I recall your evidence, and  
6           please correct me if I'm wrong, Mr. Penkala, again  
7           you said you didn't recall seeing this report, but  
8           you are familiar with what was in the report; is  
9           that a fair paraphrasing of your evidence?

01:39 10          A           Yes.

11          Q           And I believe you also said that in all likelihood  
12           the investigators would have been aware of the  
13           contents that was contained in the report? You've  
14           had a chance to look at that report.

01:40 15          A           That would be my view, yes.

16          Q           Okay. And again at page number 250603, at the  
17           very bottom, just pull that up, please, it says  
18           here, paragraph 19:

19                            "It is mentioned that during the late  
01:40 20                            fall of 1969 (sic) the local police  
21                            department had reports of two rapes and  
22                            one attempted rape. These  
23                            investigations were conducted by the  
24                            city police with negative results."

01:40 25           And then if you can go to the next page at the



1 top, please, it references the persons involved,  
2 and again there's a reference to the (V1)-,  
3 (V2)----- and (V3)----- assaults, or at least an  
4 attempted assault on the latter there. Again,  
01:40 5 from your recollection, that was information that  
6 was within the knowledge of the Saskatoon Police  
7 Service at the time?

8 A Yes.

9 COMMISSIONER MacCALLUM: Except that it was  
01:40 10 1968. You just inadvertently said '69.

11 BY MR. GIBSON:

12 Q Sorry, I meant to say 1969, but I should clarify.  
13 Thank you, Mr. Commissioner.

14 That was information that you  
01:41 15 were aware of in 1968, but in 1969 I believe your  
16 evidence -- sorry, your evidence with respect to  
17 1969 is that that is something that the Saskatoon  
18 Police Service was aware of and that there may be  
19 a possible connection with the Miller murder?

01:41 20 A Yes.

21 Q Okay. And was there anything within this report  
22 from Corporal Rasmussen that to your knowledge the  
23 Saskatoon Police Service wouldn't have been aware?  
24 I look at it and it appears to be a summary of the  
01:41 25 investigation up to that point in time. I'm



1 wondering if you've had a chance to look through  
2 that and if there's anything in there that to your  
3 knowledge the Saskatoon Police Service wouldn't  
4 have been aware of on their own in their own  
01:41 5 investigational reports within their systems.

6 A I would suggest that our investigators would have  
7 been aware of that, but again, it's a situation  
8 where my involvement was kind of around the  
9 circumference and wasn't necessarily specific. I  
01:42 10 didn't necessarily have contact with the  
11 investigators, either the RCMP or our own, this  
12 was always kind of a feedback situation.

13 Q And I think your evidence along that line was that  
14 the RCMP would work with the investigators and  
01:42 15 there would be obviously an exchange of  
16 information amongst those individuals?

17 A That was my understanding.

18 Q And I guess one of the crucial bits of information  
19 contained in this document is the review of a  
01:42 20 possible connection between the 1968 sexual  
21 assaults of (V1)-, (V2)----- and (V3)-----, or  
22 the attempted sexual assault of (V3)-----, and  
23 the Miller murder, and obviously that's a  
24 connection that the Saskatoon Police Service had  
01:43 25 made on its own?



1 A Yes.

2 Q Because clearly, and again documents, and I don't  
3 want to go through all of the documents, but Mr.  
4 Hodson went through a number of documents with you  
01:43 5 where requests were made of the lab to do  
6 analysis, the RCMP lab to do analysis of certain  
7 exhibits and to have those compared over to the  
8 Miller investigation?

9 A That's correct.

01:43 10 Q Okay. Now, while we're on the subject of lab  
11 reports, you had mentioned, and I guess there had  
12 been some discussion between you and Mr. Hodson,  
13 rather, about the timing of getting the lab  
14 reports back, and I guess from your experience as  
01:43 15 an identification officer, those would vary; would  
16 they not?

17 A Yes.

18 Q Sometimes it would be a matter of days and  
19 sometimes a matter of weeks; correct?

01:44 20 A That's correct.

21 Q And is that something that would depend upon I  
22 guess circumstances at the lab? Would you be  
23 privy to how busy they were at the time?

24 A I think there's probably a number of  
01:43 25 circumstances. Their work load would obviously be



1 involved in that consideration, also the type of  
2 examination that would be asked for, and of course  
3 my experience was that in special circumstances  
4 there was always full co-operation and wherever  
01:43 5 possible we could get results sped up.

6 Q Yes. I, and I believe you mentioned a couple of  
7 times that you would have had discussions with lab  
8 personnel; is that something that you felt  
9 comfortable doing, in just picking up the phone --

01:45 10 A Yes.

11 Q -- and asking?

12 A Yes, very much so, yes.

13 Q Okay. And would you, in those discussions, at  
14 times would you be able to say -- to ask about  
01:46 15 sort of some interim results, as to sort of where  
16 things were leading as far as their analysis?

17 A Well, I'm sure that's the way things would have  
18 gone, if they weren't complete there would be some  
19 indication of where they are at, this sort of  
01:46 20 thing, yes.

21 Q And again from your recollection, was there any  
22 delay in the lab work being done that became  
23 problematic in the Miller investigation, that you  
24 are aware of?

01:46 25 A I'm not really aware of anything that caused any



1 serious concerns.

2 Q Now we have had this document up before, it's  
3 250609, which is the Riddell report which  
4 references the May 16th meeting. You have been  
01:46 5 asked a number of questions about that, Mr.  
6 Penkala, --

7 A Yes.

8 Q -- you will recall those questions? And I think,  
9 I'm trying to be fair, what Riddell wrote was what  
01:47 10 all the people at the meeting thought about the  
11 facts to date; and, again, is that fair?

12 A In generalities I think, yes, it is.

13 Q And, obviously, there are some subtleties in there  
14 that may not be expressed in a two-page report --

01:47 15 A Yes.

16 Q -- but, overall, you would agree with that  
17 comment?

18 A Yes, yes.

19 Q So it was clear that the comments contained in  
01:47 20 that report were not isolated to the RCMP, those  
21 thoughts, those steps to be taken were something  
22 that the Saskatoon Police Service was onside with;  
23 is that fair to say?

24 A That was my, that was my view on that, yes.

01:47 25 Q And, again, some of what was to be followed up on



1 was whether Mr. Milgaard, you know, should be  
2 considered still as a prime suspect, or a suspect,  
3 and to follow up on that avenue?

4 A That's my understanding, yes.

01:47 5 Q And also in regards to that, there was going to be  
6 a requestioning of Wilson and John, and that was  
7 something that the Saskatoon Police Service was to  
8 carry out; correct?

9 A Yes.

01:48 10 Q So if this memo of May 21st, I believe, 1969 was  
11 not on the Saskatoon Police Service file and had  
12 not been shared by the RCMP, in your view was  
13 there any real consequence or failure of -- or  
14 problem, rather, with that not being shared if all  
01:48 15 of that information was already within the  
16 knowledge of the Saskatoon Police Service?

17 A Well those people that were identified in that  
18 report would have known, and I would suspect they  
19 were all informed the same way I was, and I'm not  
01:48 20 aware that this would have caused any difficulties  
21 anywhere else along the line.

22 Q And, obviously, any reporting within the Saskatoon  
23 Police Service following that meeting, and steps  
24 to be taken by the Saskatoon Police Service, would  
01:49 25 be carried out by members of the Saskatoon Police





1 Service giving directions to the investigators as  
2 to what appeared to be a plan?

3 A That's the process that's usually followed, yes.

4 Q Thank you. Now you mentioned that you had some  
01:49 5 discussions with Staff Sergeant Paynter with the  
6 RCMP who was in the crime lab?

7 A Yes.

8 Q And again, correct me if I'm wrong, but I believe  
9 you said that there was always some questions  
01:49 10 surrounding the saliva sample taken from Mr.  
11 Milgaard as to whether he was a secretor or not a  
12 secretor?

13 A That's correct.

14 Q And, again, that it was always, to your mind, not  
01:49 15 clear whether he was a secretor, was not a  
16 secretor, whether the test was valid or not valid,  
17 so that was something that was -- that was up in  
18 the air; is that correct?

19 A Well, yes.

01:50 20 Q And as far as doing secretor tests and doing blood  
21 typing, would you agree with this; that blood  
22 typing and secretor tests are really just a matter  
23 of trying to, I guess, not necessarily identify an  
24 individual, but more of a process of elimination?

01:50 25 A Yes, yes, very much so.



1 Q Because the blood grouping is a fairly large  
2 group, and then you take the blood grouping and if  
3 they are a secretor that narrows that down a  
4 little bit more but, again, 80 percent of the  
01:50 5 population of, for example, an A-type blood group  
6 would be a secretor, so you are down to a very  
7 large percentage of the population still; aren't  
8 you?

9 A That's the way I understand it, yes.

01:50 10 Q Okay. And you had some discussions along that  
11 line with Staff Sergeant Paynter then?

12 A Umm, yes. I -- I don't have any specific  
13 recollections but I do, I do know that I spoke to  
14 him, and the issue was -- was reviewed simply  
01:51 15 because there seemed to be an indication of, first  
16 of all, the uncertainty about whether he was a  
17 secretor or not, or the depositor was a secretor;  
18 and, secondly, the methods that were used, and  
19 there were suggestions made that the medium on  
01:51 20 which we got the saliva samples may have been  
21 contaminated. All these issues were obviously  
22 discussed.

23 Q And I guess Staff Sergeant Paynter, then, also had  
24 some concerns, then, about those tests himself?

01:52 25 A Well I got that --



1 Q Did he express those concerns to you then?

2 A I'm not aware, I'm not -- I don't recollect that,  
3 but I certainly had that impression.

4 Q Okay. And he'll obviously be giving evidence, and  
01:52 5 I don't expect you to give his evidence, --

6 A Yeah.

7 Q -- but your recollection is that there was that  
8 concern, over all, about the validity of such  
9 testing?

01:52 10 A Yes, yes.

11 Q And do you recall discussions with others as to  
12 how that came to be that that was going to be  
13 evidence at the trial of Mr. Milgaard?

14 A Umm, --

01:52 15 Q Is that a decision you made?

16 A No. No.

17 Q Okay.

18 A I -- my approach would have been to take  
19 possession, record the facts, because the  
01:52 20 physical, the physical aspects are, are the most  
21 impressive evidence that you can have. Even  
22 though, as it's been identified, the blood  
23 grouping doesn't necessarily point out the  
24 identity of the, of the contributor or the  
01:53 25 depositor, but at the same time it's a fact that



1 can't be denied that it's, that it's an A  
2 grouping, etcetera, etcetera.

3 Q And, again just for clarification, there was no  
4 concern as to whether the -- again we're talking  
01:53 5 about the sample that was tested from the frozen  
6 lumps that were found in the snow -- there was no  
7 question that that was an A grouping; correct?

8 A No, that's right.

9 Q And there was no question that Mr. Milgaard was an  
01:53 10 A grouping?

11 A From his blood, yes.

12 Q I guess the grey area, then, was whether secretor  
13 or non-secretor, being -- whether Mr. Milgaard was  
14 a secretor or a non-secretor?

01:53 15 A Yes.

16 Q Okay. Now you were asked by the RCMP -- or  
17 sorry -- you asked the RCMP lab to do a number of  
18 tests and examinations on various exhibits? The  
19 -- it doesn't necessary, it's not necessary to put  
01:54 20 the document up, but the document reference is  
21 09276. You would have asked the RCMP to examine  
22 the coat, the panties, the uniform and other items  
23 to see if there was any human seminal fluid found  
24 on those items?

01:54 25 A Yes.



1 Q Do you recall sending that off?

2 A Yes.

3 Q And you are aware, in 1969, the RCMP lab found  
4 seminal fluid in the vial that you forwarded?

01:54 5 That was --

6 A Yes.

7 Q -- the one that contained the frozen lump from the  
8 snow?

9 A Yes.

01:54 10 Q And they found that seminal fluid on the panties;  
11 correct?

12 A Yes.

13 Q But they did not find any seminal fluid stains on  
14 the coat or the uniform?

01:54 15 A Yes.

16 Q And again, Officer Paynter will be giving some  
17 testimony in regards to that, but were you aware  
18 of what tests were run? Did you have any  
19 discussion with him as to what tests he would have  
01:54 20 run on those items?

21 A No, not specifically.

22 Q Okay.

23 A I'm, you know, I'm -- I'm not well-acquainted nor  
24 qualified to be involved in that --

01:55 25 Q Yeah.



1 A -- and the dependence is totally on the technician  
2 at the lab.

3 Q And you, yourself, you mentioned earlier in your  
4 testimony that you did a visual inspection of some  
01:55 5 of the exhibits, including the coat and the  
6 uniform, and that you, yourself, didn't see any  
7 seminal staining; that's correct?

8 A That's right.

9 Q And I take it you have had some experience at that  
01:55 10 point in time, or had some experience at that  
11 point in time, in trying to identify stains on  
12 garments?

13 A Well it, when we're talking about 'stains' it  
14 would be stains that would be visible to the  
01:55 15 eye, --

16 Q Yes?

17 A -- and that's the type of stain was not visible on  
18 the garment.

19 Q And had you ever tried to look for any seminal  
01:55 20 staining on a garment that had been exposed to  
21 moisture or snow, in this example, in this case,  
22 have you ever -- has that --

23 A I never.

24 Q Have you had any experience on that, sir?

01:56 25 A No.



1 Q And did you use a black light or a UV light when  
2 you examined the clothing items, do you recall, at  
3 that time?

4 A I don't have any recollection of attempting to use  
01:56 5 any aid in finding stains on the garments.

6 Q And had you used a black light prior to that time  
7 or at, after that time, or a UV light to try and  
8 identify stains; is that something --

9 A I know, I know that there was a black light  
01:56 10 available in the section, I think the general  
11 approach would be that it would be best left to  
12 the experts.

13 Q Okay. And, again, there was no seminal staining  
14 found by Staff Sergeant Paynter on the uniform and  
01:57 15 coat; are you aware that other people later on,  
16 into the '80s and '90s, tried to examine those  
17 items and also did not find any staining?

18 A I wasn't really aware of that.

19 Q Okay. Well, again, there may be evidence on that  
01:57 20 but I just wondered whether you, yourself, had any  
21 acquaintance or familiarity with that?

22 A No.

23 Q Okay. Now there's been a lot of questioning  
24 already about identifying stains on garments and  
01:57 25 I'm sure that we'll have much more of that



1 evidence. It brings us back to the discarding of  
2 the vaginal aspirate that was, I guess, thrown  
3 away on January 31st of 1969. And Mr. Hodson  
4 asked you a number of questions about that, and  
01:57 5 again, I'm trying to paraphrase your evidence, and  
6 correct me if I'm wrong. Your recollection is  
7 that you had a discussion with Dr. Emson and,  
8 after that, that was discarded by yourself?

9 A No, no, we never received it in the first  
01:58 10 instance, --

11 Q Okay.

12 A -- but if we'd have asked for it I'm sure it would  
13 have been provided.

14 Q Okay.

01:58 15 A Generally what happens is that the pathologist  
16 does all the examination and provides the  
17 specimens, and we would ask for certain specimens,  
18 and the one issue that came to light was that Dr.  
19 Emson examined a sample of that aspirate and  
01:58 20 indicated that there was immobile spermatozoa in  
21 the collection. And basically I have no  
22 recollection, I -- I assumed that there was -- saw  
23 no value in pursuing that any further, we were  
24 satisfied with Dr. Emson's interpretation that  
01:58 25 there was sperm within the, within the thing, but





1           beyond that I have no recollection of whether we  
2           literally discussed it or we had any questions  
3           about it.

4           **Q**       I'm wondering, and again Mr. Hodson has been  
01:59 5           through this with you and I'll try not to belabour  
6           the point, on January 31st that sample is not  
7           retained and on February 4th you go out to the  
8           site to basically try and find what's been thrown  
9           away a few days before. I'm wondering if you can  
01:59 10          recall what occurred during that four days that  
11          made you think that you needed to go back out to  
12          the site and try and find the frozen lumps in the  
13          snow rather than having retained, sort of, the  
14          better exhibit --

01:59 15          **A**        Yeah.

16          **Q**        -- on January 31st?

17          **A**        Well basically the return to the scene was  
18          basically to re-examine it for the very purposes  
19          of whether there was something missed, and it was  
02:00 20          on that occasion that, that these frozen lumps  
21          were found, and they were taken possession of, and  
22          then eventually sent to the lab for analysis. But  
23          that wasn't the prime purpose of going back to the  
24          scene and I, I know that I returned to that scene  
02:00 25          many times after February the 4th and after, after



1 January the 31st.

2 Q So it was just something that you saw, then, in  
3 the snow after -- as you were sifting through it  
4 and thought 'well, perhaps this has evidentiary  
02:00 5 value', and it crossed your mind on February 4th  
6 but didn't cross your mind on January 31st?

7 A No. And I, I obviously didn't see it on January  
8 31st. I mean I was, I was digging through the  
9 snow, I found a broken blade of a knife, but I  
02:01 10 have no recollection of, of other items of  
11 interest at that particular time.

12 Q No. And I guess what I -- I didn't phrase that  
13 very well -- what I am getting at is on February  
14 4th you find these lumps in the snow and I would  
02:01 15 assume you had a suspicion then, and correct me if  
16 I'm wrong, that those might be an ejaculate  
17 discharge --

18 A Yes.

19 Q -- and so you decided to retain that, yet on  
02:01 20 January 31st the aspirate from the vagina was not  
21 saved?

22 A That's right.

23 Q And I'm just wondering about the mental processes  
24 on January 31st versus February 4th and what  
02:01 25 happened in that four days that you would see the



1           evidentiary value of retaining those frozen lumps  
2           as opposed to not retaining the vaginal aspirate?  
3           And maybe you can't tell us any more than you have  
4           but --

02:02

5           A           Yes.

6           Q           -- I would like to hear it if you can?

02:02

7           A           Well I think the absence, or the long time frame  
8           has created a situation where I don't have any  
9           specific recollection of what conversation took  
10          place in the pathology lab, and I'm sorry that I  
11          can't help in that regard.

12          Q           And I think you agreed, in your examination with  
13          Mr. Hodson, that that's something, the aspirate is  
14          something that should have been saved?

02:02

15          A           Well in hindsight, obviously, yes.

16          Q           And that's something that, again correct me if I'm  
17          wrong, that in subsequent sexual assault cases you  
18          would instruct the pathologist to retain the  
19          aspirate?

02:02

20          A           Well it, it also depends on the nature of what the  
21          complaint is. I mean, you know, we -- I recall in  
22          some cases where it was a rape case all we were,  
23          all we asked for is a slide, and the slide was  
24          sufficient to establish whatever, whatever it was  
02:03 25          that was necessary in regards to it. And I think



1 in those days there was a total absence of  
2 identification on the basis of DNA, which didn't  
3 exist at that time, so that part of it obviously  
4 was not -- not even questioned. There's just no  
5 --

02:03

6 Q And I notice, and I -- that in some of the other  
7 documents -- and forgive me, I can't point you to  
8 this -- but the other sexual assaults that  
9 occurred earlier, I believe it may have been the  
10 (V1)- sexual assault, that a slide was taken?

02:03

11 A Yes.

12 Q And, again, I don't believe a slide was taken in  
13 the Miller case; is that fair to say?

14 A That's right. And I had explained that on the  
15 basis that Dr. Emson was able to identify that  
16 there was sperm there, and we would be satisfied  
17 with his expertise, --

02:04

18 Q Okay.

19 A -- so we, we wouldn't really have to duplicate  
20 that aspect of it by getting a slide and having  
21 the lab confirm what he already had identified.

02:04

22 Q And I suppose the obvious recommendation -- and  
23 Mr. Hodson asked you this, to come up with  
24 recommendations or in a -- he asked you questions  
25 with respect to what could have been done

02:04



1                   differently, and I think you would agree that if  
2                   that aspirate had been saved there wouldn't be any  
3                   question about trying to locate stains and doing a  
4                   subsequent DNA test? And of course hindsight is  
02:04 5                   20/20, --

6           A           Yes.

7           Q           -- but that would be something that obviously  
8                   could have been changed, or if it would have been  
9                   changed it might have altered the outcome of this  
02:05 10                   matter earlier?

11          A           Possibly.

12          Q           Okay. But obviously, as you mentioned, back in  
13                   '69 there was no prospect of DNA testing then?

14          A           That's correct.

02:05 15          Q           And again, correct me if I'm wrong, but once you  
16                   identify that it's human semen, once you identify  
17                   the blood type, and once you identify -- try to  
18                   identify the secretor status, are you aware of any  
19                   other tests, at that time, that could have been  
02:05 20                   done?

21          A           No.

22          Q           So, again, my understanding through your  
23                   evidence -- and of course there will be other  
24                   evidence on this point -- is that all of the tests  
02:05 25                   that could have been done with respect to the



1 sample that was obtained, the frozen lump sample  
2 that was obtained, all of those tests were done;  
3 the blood type was identified, and the test was  
4 done on secretor status, and, also, there was an  
02:06 5 identification with respect to it being human  
6 semen?

7 A Yes.

8 Q Thank you very much.

9 **BY MR. LOCKYER:**

02:06 10 Q Mr. Penkala, if I could just start with a very  
11 simple issue. You said two or three times during  
12 your questioning by Commission Counsel that you  
13 didn't have an opportunity to do a second, that  
14 you didn't have a chance to obtain a second saliva  
02:07 15 sample from Mr. Milgaard, because he got charged  
16 by the time you realized you needed one; is that  
17 right?

18 A I'm not sure that I said it in those precise  
19 words, but I was not in a position to obtain any  
02:07 20 further samples regarding the secretor and saliva  
21 tests.

22 Q I'm just wondering why you wouldn't ask his  
23 counsel if his client would give another sample --

24 A Well --

25 Q -- which --



1 A -- I think it's important to recognize that my  
2 involvement was not as a lead investigator, and  
3 many of these things that I have been questioned  
4 on and provided information on is kind of, it's  
02:07 5 really hearsay evidence, things that I learnt from  
6 other people and the likes of that. But the  
7 investigators would have been the people that  
8 would have attended to that and looked after that  
9 if, if that was of significance.

02:08 10 Q Well did you ask them to get a second sample?

11 A No, I didn't.

12 Q No? And presumably you could have and then they  
13 could have asked Mr. Tallis if Mr. Milgaard would  
14 provide a second sample; right?

02:08 15 A I could have, yes, I suppose.

16 Q Uh-huh?

17 A And they wouldn't have necessarily had to listen  
18 to me.

19 Q All right. I want to spend the next while on the  
02:08 20 assertion that you made implicitly throughout your  
21 questioning by Commission Counsel, and in fact  
22 explicitly as well, that there was no attempt made  
23 to conceal the existence of the various sexual  
24 offences that Mr. Fisher committed. All right? I  
02:09 25 want to go through that assertion --



1 A Yes.

2 Q -- and test it as best I can. Now if we go back  
3 to the early days in 1969, in the days following,  
4 the days, weeks, and indeed months following Gail  
02:09 5 Miller's murder, it would seem -- and I'm going to  
6 take you through it sort of one by one -- that a  
7 lot of people, and certainly everyone close to  
8 this investigation, made the connection between  
9 the sexual assaults that had happened in 1969 --  
02:09 10 sorry -- in 1968, my mistake, and the rape/murder  
11 of Gail Miller; is that right?

12 A The similarities, yes.

13 Q Yes. You made the connection yourself back in  
14 1969?

02:09 15 A Yes.

16 Q In fact during questioning by Commission Counsel  
17 you said, and I think I wrote it down correctly,  
18 I'm trying to quote you, quote:

19 "That was always a question that was  
02:10 20 there"?

21 A Yes.

22 Q And you meant during the investigation; is that  
23 right?

24 A Yes, yes.

02:10 25 Q All right. The RCMP certainly made the





1 connection, is that right, we can see that in the  
2 documents?

3 A It appears that way, yes.

4 Q The Rasmussen document, for example, referred to  
02:10 5 it as there 'being a strong possibility that the  
6 crimes were connected'; do you remember that?

7 A Yes.

8 Q Okay. The officer in charge of the Gail Miller  
9 investigation, Detective Mackie, made the  
02:10 10 connection; is that right, sir?

11 A I think he did, but --

12 Q He did it in two reports, first of all 106142,  
13 please. This is going to be a report of Detective  
14 Mackie's of February 1st, 1969, sir, on the Gail  
02:10 15 Miller investigation that we're about to see. And  
16 if you look at the bottom you will see reference,  
17 for example in this report of Detective Mackie's,  
18 to the rape of (V2) (V2)- (V2)-----; do you see  
19 that?

02:11 20 A Yes.

21 Q And that she was brought in and interviewed and  
22 shown photographs; do you see that?

23 A Yes.

24 Q And that was a part of the Gail Miller file that  
02:11 25 that report was prepared under, if I can put it



1           that way, do you follow me? Do you follow?

2           A           Obviously, yes.

3           Q           Yes. All right. And as well, sir, just to take  
4           another example, if we look at 106656, please, we  
02:11 5           have -- we're about to see an April 4th, '69 --  
6           it's actually not dated but it looks like it's  
7           April 4th, '69 if only because that's the -- it  
8           was filed April 7th but the last event referred to  
9           at the bottom is April 4th, and if you look at the  
02:11 10          top there you will see reference, again, to  
11          Ms. (V2)-----, all right, in the context of the  
12          Gail Miller murder investigation?

13          A           That's what Detective Sergeant Mackie's report  
14          suggests, yes.

02:12 15          Q           Yes. So he has made the links, the officer in  
16          charge?

17          A           Yes.

18          Q           Yes. All right. And then, I can't bring up a  
19          document, but I remember, as you went through them  
02:12 20          during examination by Commission Counsel, that the  
21          person who took the swabs that had been taken from  
22          Ms. (V1)- and Ms. (V2)----- to the RCMP lab was,  
23          in fact, Detective Short; do you remember that?

24          A           Umm --

02:12 25          Q           He's the one who actually took them physically?



1 A It may very well be, I -- I don't recall at the  
2 moment, but --

3 Q Assuming that's accurate then, clearly, he knew;  
4 he had direct knowledge of the links?

02:12 5 A Well I would assume he did, yes.

6 Q Yes. And the five-page document, sir, that's  
7 referred to in the, in the document collection as  
8 being the 'smoking gun' -- you know the document I  
9 mean?

02:12 10 A Umm, oh, the summarized -- the identified points  
11 and the summary?

12 Q Yeah, and the one, the 'what we're looking for',  
13 so to speak, document?

14 A Yes.

02:13 15 Q All right. If we can call it 'the smoking gun' as  
16 sort of the, that's what it's called in the list  
17 of documents, sir, it's a nice abbreviation of  
18 what it is, there was a direct reference made to  
19 the rape of Ms. (V1)- in that document; remember?

02:13 20 A Yes.

21 Q Indeed it was seen, I don't know if it's  
22 necessarily seen as the most important fact, but  
23 suffice to say it's the first piece or it's the  
24 first item listed on the document; correct?

02:13 25 A Umm, you may be right, but yes, it was certainly



1           involved in that.

2           **Q**       If we can go to 001499 you will see it's right at  
3                   the top on page 1 of the documents, sir,  
4                   Ms. (V1)-'s rape. And presumably -- you see that?

02:14 5           **A**       Yes, I do, yes.

6           **Q**       And presumably, sir, Ms. (V1)-'s rape would be  
7                   there because hers was the one which was  
8                   identified to an assailant who had Group A,  
9                   remember, as opposed to Ms. (V2)-----'s rape where  
02:14 10                  there had been no result?

11          **A**       Umm, I'm not certain about that.

12          **Q**       If you look at the third entry there sir, page  
13                  337, you will see there's direct reference to it.  
14                  I guess that doesn't mean that's why it's in there  
02:14 15                  and (V2)----- isn't, but it's perhaps a signal as  
16                  to why Ms. (V1)-'s case is in there but Ms.  
17                  (V2)-----'s isn't?

18          **A**       Oh yes, yes, yes.

19          **Q**       You see that?

02:14 20          **A**       Yes.

21          **Q**       Okay. And you told us sir, during your  
22                  questioning by Commission Counsel, that the  
23                  connection between those previous sexual assaults  
24                  in 1968 was discussed and made during the course  
02:14 25                  of the May 16th meeting; is that right?



1 A Yes, and I don't recall specifically, but I would  
2 be, I would be very surprised if that wasn't  
3 discussed.

4 Q Uh-huh. And going back to, a moment to the  
02:15 5 smoking gun document, sir, that was and indeed  
6 became a part of the case preparation brief for  
7 the Gail Miller prosecution; is that right?

8 A I don't know that.

9 Q Okay. Well I think we have numbers on it which  
02:15 10 indicate that that's the case.

11 A I don't know that. The numbers are --

12 Q Could Commission Counsel correct me if I'm wrong  
13 but I think the numbers on the pages --

14 A The page numbers --

02:15 15 Q -- suggest that?

16 MR. HODSON: Yes. Again, we will hear from  
17 the case preparation officer who prepared a  
18 different document. This is not a document that,  
19 to our knowledge, was part of the case  
02:15 20 preparation. It's the same type of document as a  
21 case preparation would prepare but I don't  
22 believe we will be hearing evidence that this  
23 became part of the court brief. Something like  
24 it. And if you look at this and the court brief,  
02:15 25 they are similar in that they have -- the court



1 brief refers to witness names and references to  
2 page numbers and pages, but I don't believe this  
3 became part of the court brief to the prosecutor.

02:16 4 MR. LOCKYER: All right. Certainly it  
5 would seem -- and, again, correct me if I'm  
6 wrong -- that the (V1)- case, at a minimum, was a  
7 part of the case preparation brief, if only  
8 because of the page references that appear on the  
9 document? So we've got pages 352, 349, 337 for  
02:16 10 example.

11 MR. HODSON: We can call up the court brief  
12 that was prepared for the prosecutor if you want  
13 to look at that document.

14 MR. LOCKYER: Could we? I guess page 352,  
02:16 15 just to take an example.

16 MR. HODSON: 025629, 025629, please. This  
17 is the court brief preparation, and so you will  
18 see references to statements and page numbers,  
19 and certainly the page numbers in the document  
02:17 20 that Mr. Lockyer referred to coincide with the  
21 page numbers that were used in this report. The  
22 evidence from Elmer Ulrich will be that the  
23 police file was numbered consecutively, the  
24 investigation reports and the statements were --  
02:17 25 and I believe the evidence will be in mid-May of



1 '69, when a five-page summary was prepared, that  
2 those four pages would be prepared at a time when  
3 the file, as existed at that point, had page  
4 numbers on it, so the page numbers are the same.  
02:17 5 I think, if you look at this court brief, I do  
6 not believe there is a reference to (V1)--- (V1)-  
7 in this document. Is that --

8 MR. LOCKYER: No, I don't understand,  
9 sorry. Can I just talk quietly with Commission  
02:18 10 Counsel for a minute, Mr. Commissioner, please?

11 COMMISSIONER MacCALLUM: Uh-huh.

12 *(Discussion off the record)*

13 MR. LOCKYER: I think we were a little bit  
14 at crossed purposes, Mr. Commissioner, and --

02:17 15 MR. HODSON: If you want to call up the, if  
16 you want to know whether -- the question  
17 Mr. Lockyer has is whether an investigation  
18 report would be in the Court brief that went to  
19 the prosecutor and again we haven't heard  
02:17 20 evidence on that yet and we will and there may be  
21 some issue as to both what was sent and what was  
22 received, but there is a Court brief document  
23 which is up on the screen that refers to page  
24 numbers and it may be that by looking at the  
02:17 25 investigation report, you can tell from that



1 document that it should have been on the Court  
2 brief, but I stress we will hear evidence from  
3 Mr. Caldwell, Mr. Ullrich and others about what  
4 was sent and what was received. We've tried to  
02:17 5 reconstruct this Court brief by the page numbers  
6 to the documents, so, Mr. Lockyer, if you want to  
7 call up those investigation reports that you  
8 referred to, you should be able to tell by  
9 looking at the tag on that.

02:18 10 MR. LOCKYER: All right. I haven't quite  
11 got the hang of this yet. 106142 is one of the  
12 ones I referred to.

13 MR. HODSON: So based on our review, there  
14 is not a police report that has a page number in  
02:18 15 the right-hand side that indicates it was part of  
16 the Court brief. However, we've heard evidence  
17 from Mr. Penkala, we will hear other evidence  
18 that all the police reports were sent and we may  
19 hear different evidence from Mr. Caldwell, so  
02:18 20 again, I can't state with certainty, based on  
21 what we've reviewed, as to whether or not this  
22 was sent or not, and received.

23 BY MR. LOCKYER:

24 Q I understand. Now, the three crimes, sir, that  
02:18 25 had taken place, just to remind you, in a five





1 week period in 1968 had taken place on October  
2 21st of 1968, that's the (V1)--- (V1)- rape;  
3 right? I'm just informing, I'm not -- there's  
4 nothing up here to tell you.

02:19 5 A Well, I wasn't specifically involved in those  
6 investigations.

7 Q No, I understand.

8 A They came to my attention as a result of examining  
9 the Miller murder and then these things came to my  
02:19 10 attention and I learned the information from  
11 reports and from files in that fashion, so I think  
12 it's important that it be known I was not  
13 physically involved in the examination of those  
14 investigations, of those rapes that you are  
02:19 15 identifying.

16 Q Until after the Gail Miller murder?

17 A Until after the Gail Miller murder, yes.

18 Q Right. And then there was the November 13th, '68  
19 rape of (V2)- (V2)-----'s and then the November  
02:19 20 29th, '68 attack on (V3)-- (V3)-----, and you are  
21 aware of those three cases; right?

22 A I'm aware of them now, yes.

23 Q And indeed you were aware of them back in, after  
24 January 31st, '69 for sure?

02:20 25 A Yes, they came to my attention, yes.



1 Q Right. You may well have been aware of them  
2 before that. Would you not likely have been aware  
3 of a serial rapist apparently existing in the City  
4 of Saskatoon?

02:20 5 A Obviously in a general sense I would have probably  
6 known, but --

7 Q And we've seen there were newspaper stories on it  
8 at the time locally as well?

9 A I would expect that they were there, yes.

02:20 10 Q Yes. And one of the things, sir, that you became  
11 aware of, at least if not earlier, but certainly  
12 after Gail Miller's murder, was a number of  
13 similarities between those crimes and that of Gail  
14 Miller; am I right?

02:20 15 A Yes.

16 Q And I want to take you through them very quickly.  
17 First of all, those three crimes were all attacks  
18 on women by strangers and you surmised, and indeed  
19 the police investigation surmised that Gail Miller  
02:21 20 was likely the victim of an attack by a stranger;  
21 is that right?

22 A Yes.

23 Q All the victims back in 1968, as well as Gail  
24 Miller, were all young women; correct?

02:21 25 A Yes.



1 Q So far as just the three events were concerned  
2 back in 1968, the description of a suspect by the  
3 three victims were similar?

4 A My recollection is, yes, similar.

02:21 5 Q That they were similar. Obviously you didn't have  
6 a description from the Gail Miller murder. Two of  
7 those previous events, two of those previous  
8 attacks had taken place very close to where Gail  
9 Miller was raped and murdered; correct?

02:21 10 A In the vicinity, yes.

11 Q It turned out that there was a possible link,  
12 although whether you became aware of this or just  
13 the investigators became aware of this, what might  
14 be called a hard hat link?

02:22 15 A Yes.

16 Q In that (V2)-----'s described her assailant as  
17 wearing, I'm never quite sure which one is white  
18 and which one is yellow, I think she said a white  
19 hard hat, and then McCorrison interviewed Fisher  
02:22 20 at a bus stop and discovered he was wearing a  
21 white hard hat? Do you remember that?

22 A I was aware that that had occurred, yes.

23 Q So you were aware then of a possible hard hat  
24 link?

02:22 25 A Oh, yes.



1 MR. FOX: Mr. Fisher wasn't wearing a white  
2 hard hat.

3 MR. LOCKYER: I've got a white and a  
4 yellow, I don't know which way around they are.

02:22 5 MR. FOX: It's kind of important. I think  
6 it was a yellow hard hat that Mr. Fisher was  
7 wearing.

8 BY MR. LOCKYER:

9 Q And it was white that Ms. (V2)-----'s said her  
02:22 10 assailant was wearing, okay. In two of the cases,  
11 that is, the '68 cases, and indeed arguably in the  
12 third, it would have happened but it got stopped,  
13 the victims were all forced to undress and you had  
14 reason to think Gail Miller likewise?

02:23 15 A That's my recollection of what took place at the  
16 rapes, and of course that's what took place at --

17 Q Not just then the clothing waist down, but the  
18 clothing waist up as well?

19 A Well, I don't recall seeing the specifics of the  
02:23 20 rapes other than what was provided to me through  
21 questions I suppose. I don't recall seeing the  
22 actual statements from the victims of the rapes,  
23 although they have, they were on the screen here  
24 for me during my testimony here.

02:23 25 Q So -- but it's fair to say that if not, you



1           certainly had a good idea of the similarities and  
2           one could assume that the actual investigators,  
3           especially Mackie, would know the precise  
4           similarities; is that fair to say?

02:24 5           A           Yes.

6           Q           Yes. Another obvious similarity, sir, is that in  
7           the rapes of Ms. (V1)- and Ms. (V2)-----'s, they  
8           had been ordered to take their coats off and  
9           indeed had been raped lying on their coats. Do  
02:24 10          you remember that?

11          A           I have some recollection of that being made  
12          available, that knowledge being made available.

13          Q           Which seemed to have perhaps an extraordinary  
14          parallel potentially to the Gail Miller case  
02:24 15          because of the nature of -- because of the fact  
16          that there were cuts in her coat but not in her  
17          clothing underneath. Do you remember that?

18          A           Yes.

19          Q           Suggesting that her coat had been taken off and  
02:24 20          then somehow she managed to get it back on,  
21          whether with consent of her assailant or just by  
22          virtue of her own strength; right?

23          A           Yeah, of course.

24          Q           That you might say was particularly, would you  
02:25 25          think that's a particularly striking similarity of



1 the offences, the coat similarity?

2 A I would say so, yes.

3 Q Yes. In both the cases where Mr. Fisher -- sorry,  
4 where the assailant I should say, it's not Mr.  
02:25 5 Fisher yet, where the assailant had not been  
6 interrupted and the Gail Miller case, there had  
7 been ejaculation by the assailant; correct? You  
8 knew that?

9 A No, I don't think I did know that.

02:25 10 Q Well, you certainly found it out if only because  
11 you made submissions on the (V1)-/(V2)-----'s  
12 cases of semen to the lab. Remember?

13 A No, I don't recall that part. We made submissions  
14 of slides.

02:25 15 Q But they came back -- sorry, you are right, they  
16 may not have come back that way with (V2)-----'s,  
17 they certainly did with (V1)-, they came back as  
18 semen?

19 A No, I'm not aware of that.

02:26 20 Q All right. Then at a minimum they came back where  
21 the assailant would seem to have left behind a  
22 group A substance that identified him as a  
23 secretor. Remember?

24 A Well, again, we're talking about the rapes and not  
02:26 25 the Miller case -- we're talking about the rape



1 cases?

2 Q Right, yes, correct.

3 A And --

4 Q The two of them because the third didn't become a  
02:26 5 rape.

6 A Yes, and I stated on several occasions I wasn't  
7 all that familiar with all the intricacies of the  
8 actual investigation because I wasn't involved in  
9 the investigation.

02:26 10 Q But you got the results back from the lab,  
11 remember you made the submissions on Miss (V1)-'s  
12 case and Ms. (V2)-----'s case?

13 A I made the submissions. I don't have any  
14 recollections of dealing with semen with the  
02:26 15 rapes.

16 Q All right. But I've said at a minimum in the  
17 (V1)- case, you knew that you had come back with a  
18 result from the assailant that showed that he was  
19 an A secretor?

02:27 20 A There was a slide, in one of those cases there was  
21 a slide that was forwarded to the lab and I'm not,  
22 at this moment I can't think of just what the  
23 answer was, but that's in the records there  
24 somewhere.

02:27 25 Q Well, if you go back to the five-page smoking gun



1 documents, we already read it, (V1)- clothing  
2 revealed to crime laboratory that her attacker was  
3 an A group secretor?

4 A Yeah, that was possibly from the slide --

02:27 5 Q Right, right.

6 A -- that was submitted, and I actually authored the  
7 letter to the lab seeking that examination.

8 Q I know you did.

9 A And that responsibility kind of fell on the  
02:27 10 identification section and an investigator would  
11 have brought that forward and said would you  
12 provide the direction to the lab to have the  
13 following tests conducted.

14 Q In each case, sir, where the assailant in the  
02:28 15 three cases, including Gail Miller, in which the  
16 assailant had completed what he had set out to do  
17 it would seem, there was evidence to suggest that  
18 souvenirs had been taken; is that right?

19 A Yes, yes, yes.

02:28 20 Q In the (V1)- case it was jeans, in the (V2)-----  
21 case it was articles of clothing and in the Gail  
22 Miller case you had reason to believe that her  
23 assailant had walked off with her white silk head  
24 scarf with her initials on it. Do you remember?

02:28 25 A Yes.





1 Q And as well, and I don't say this, it's in your  
2 report, he may have also walked off with her  
3 sanitary pad belt; is that right?

4 A Yes, that was a theoretical suggestion and it was  
02:29 5 written specifically to inform the investigators  
6 that that may be something that would be of value  
7 and if they were out there they would, they should  
8 keep that in mind.

9 Q In the (V1)- case, sir, insofar as you had got a  
02:29 10 result in that case, you had identified that the  
11 perpetrator in her case, as in the case of Gail  
12 Miller, was an A secretor?

13 A Well, I'm not sure at this stage. I think there  
14 was a lab report that came back from the crime  
02:29 15 lab. I think the reliance should be put on that  
16 lab report.

17 Q That's where I'm getting it from, sir.

18 A Okay.

19 Q And finally, sir, certainly, and particularly in  
02:29 20 the (V1)- and (V2)----- cases, there was good  
21 reason to believe that the, and I suppose it makes  
22 good sense, but the assailant seemed to take  
23 particular care to avoid his identity being known,  
24 or seen shall I say, seen?

02:30 25 A I recall that being part of that, yes.



1 Q Which if you then transpose that into the Gail  
2 Miller rape/murder, one could easily theorize that  
3 perhaps the murder had resulted from her having  
4 seen her assailant while being raped?

02:30 5 A That's certainly a possibility.

6 Q Now, with all those similarities, sir, would you  
7 also be able to take into account in deciding  
8 whether or not the same man had committed these  
9 offences that attacks of this nature in Saskatoon,  
02:30 10 would it be fair to say, are comparatively rare;  
11 is that fair? That is, stranger rapes where women  
12 are accosted on the street, dragged into alleyways  
13 and raped, pretty unusual in Saskatoon?

14 A Yes, I think that's a fair statement, yes.

02:31 15 Q I'm sorry, I didn't hear you.

16 A I think that's a fair statement, yes.

17 Q So when you consider that with the obvious, or the  
18 superficial, if not -- a lot more than superficial  
19 links between the four cases, bearing in mind that  
02:31 20 in the (V3)----- case the assailant was  
21 interrupted before he managed to carry through  
22 with his intentions, when you put that together  
23 with the rarity of this kind of attack in the City  
24 of Saskatoon, particularly back then perhaps in  
02:31 25 1969, there really was very good reason indeed to



1 think that the same person was doing these; you  
2 agree?

3 A I explained that before in that simply because  
4 there are similarities does not necessarily mean  
02:31 5 it identifies the same person, and from  
6 experience, I've seen a lot of similarities with  
7 very different perpetrators involved in the cases,  
8 so I think if you put all your responsibilities on  
9 the similarity thing, I think that would be a  
02:32 10 mistake as well.

11 Q All right. If you listen to the question, sir, I  
12 suggested to you there was very good reason, not  
13 an absolute conclusion, but a very good reason to  
14 think that the same person may be committing these  
02:32 15 crimes.

16 A Of course they were reasons, yes.

17 Q Good reasons?

18 A Well, reasons.

19 Q Would you agree? Do you have problems with that?

02:32 20 A No, not really.

21 Q Okay. I mean, Rasmussen called it a strong  
22 possibility which you might call a good reason,  
23 for example?

24 A Right.

02:32 25 Q Right. All right. Because the -- so really what



1           you had, and you could say to yourself, is either  
2           we've got a serial rapist at work who has  
3           committed each and every one of these crimes,  
4           these four crimes, bearing in mind we're now, say,  
02:33 5           at February 1st, 1969, all right, or we've got  
6           more than one person, anything up to four people  
7           who are accosting and sexually attacking women as  
8           they walk the streets of Saskatoon?

9           A       All possibilities, yes.

02:33 10          Q       Tell me, sir, in the time that you were an officer  
11           in the Saskatoon Police Force, if you set aside  
12           this case, put this case to one side which we now  
13           know of course was the work of a serial rapist,  
14           Larry Fisher, set these cases aside, if you will,  
02:33 15           for a moment, are you aware, sir, or do you  
16           remember any other cases in your police career in  
17           Saskatoon of a serial rapist at work?

18          A       No, I can't say that I am personally aware of any.

19          Q       That they are that rare?

02:34 20          A       Well, yes.

21          Q       I mean, where I come from, a huge city compared to  
22           this one, and I don't say that as a favourable  
23           comparison, I say it as a negative comparison, I  
24           think I'm not -- I haven't got stats or anything,  
02:34 25           but we probably get one serial rapist a year in



1 the greater Toronto area and here it's perhaps  
2 more like one a decade or one every 20 years; is  
3 that fair?

4 A Right.

02:34 5 Q Now, if you then chuck in, so I'll throw into the  
6 mix the fact that another woman was sexually  
7 assaulted within 20 minutes of Gail Miller's  
8 murder within a radius of some five blocks or so  
9 of where she was murdered and bear in mind the  
02:35 10 time of day and the temperature, that a very  
11 strange time you might think for a rapist to be  
12 out at work and even stranger temperature for a  
13 rapist to be at work on the streets of Saskatoon,  
14 that would be an indication again that you might  
02:35 15 be dealing with a single individual. Do you  
16 think, sir?

17 A That's certainly a possibility, yes.

18 Q Now, you said yesterday, as I understood it, that  
19 you weren't aware of the attack on (V4)----  
02:35 20 (V4)--- back in 1969; is that right, sir?

21 A That's the latest one, is that the one that you  
22 just mentioned?

23 Q That was the one that happened within about 20  
24 minutes of Gail Miller's murder.

02:35 25 A Yes, and I really wasn't aware of that until way



1 later on into my involvement in this case.

2 Q And I must say I wonder how you couldn't be, sir.

3 For example, if we look at 106110, please, we have

4 the report of the attack on Ms. (V4)--- reported

02:36 5 by Detective Bennett of the Saskatoon Police Force

6 on the Gail Miller file. Do you see that?

7 A Yes.

8 Q You see that?

9 A I see it, yes.

02:36 10 Q And that wasn't discussed on May 16th?

11 A I have no recollection of this case being

12 discussed.

13 Q It wasn't discussed on May 16th?

14 A Not with me.

02:36 15 Q That 20 minutes after Gail Miller's murder another

16 woman was sexually assaulted within five or six

17 blocks?

18 A At that meeting on --

19 Q May 16th.

02:36 20 A Yeah. It may very well have been, but I

21 don't have recollection. I didn't see this report

22 before.

23 Q All right. So you are saying now that you may

24 have known about the (V4)---- (V4)--- attack, but

02:37 25 if you did know about it, you've forgotten about



1 it since?

2 A Well, yeah.

3 Q I didn't understand that.

4 A It was the meeting of, that particular meeting  
02:37 5 was, I refer to it as a brainstorming meeting and  
6 many things were discussed, and yes, we have a  
7 summary of issues that were supposedly brought up  
8 at that, but I didn't take any notes at that  
9 meeting, so I have to assume that they were all  
02:37 10 discussed, including this, but I have not seen  
11 this occurrence report before.

12 Q So it may well be then, in fact you are suggesting  
13 that it seems likely that if not before, certainly  
14 by May 16th you became aware of the (V4)----  
02:37 15 (V4)--- attack?

16 A Only in a very general sense, yes.

17 Q Because certainly, I mean, for example, the RCMP  
18 knew about it and they were at that meeting; were  
19 they not?

02:38 20 A Yes.

21 Q If we look at 250598, a report of -- I forget his  
22 title, Rasmussen, I can't remember what he was.

23 A PC.

24 Q Corporal Rasmussen, thank you. Look at his report  
02:38 25 of May 7th, '69 and look at page 250603, sir, of



1           that report, which is a section of the report  
2           referable to March 10th, 1969, so we're now more  
3           than two months before your meeting of May 16th.  
4           You follow me?

02:38 5           A           Yeah.

6           Q           Are you with me?

7           A           And I wouldn't have had access to this particular  
8           report.

9           Q           You'll see at the top, item 15:

02:38 10                         "It is mentioned that at approximately  
11                                 8:25 PM on the date of this incident, a  
12                                 complaint was received from the  
13                                 Saskatoon City Police from one (V4)----  
14                                 (V4)--- ..."

02:38 15           Etcetera, etcetera. You see that?

16           A           Yes.

17           Q           So not only then can we say that the Saskatoon  
18           Police Service knew about (V4)---- (V4)---'s  
19           attack, the attack on her in other words on, as of  
02:39 20           January 31st, 1969 because that's when she  
21           reported it, but also that the RCMP knew about it  
22           as well?

23           A           Yes.

24           Q           So given on May 16th you've got both services well  
02:39 25           represented at this brainstorming meeting, it





1           seems more than likely that (V4)---- (V4)--- got  
2           discussed during the course of the meeting; is  
3           that fair, sir?

4           A           That could very well be, yeah.

02:39 5           Q           It's hard to see how a sexual assault 20 minutes  
6           after the rape/murder of Gail Miller within five  
7           blocks, bearing in mind the time of day and the  
8           temperature, how that couldn't have been seen as  
9           potentially relevant to your discussions on May  
02:39 10          16th.  Wouldn't you agree?

11          A           I would think that that would be an important  
12          issue, yes.

13          Q           Even more relevant, you might think, than the  
14          apparent potential for the same person having  
02:40 15          perpetrated the 1968 sexual attacks as well would  
16          you not think?

17          A           Yes.

18          Q           (V4)--- just stands out, doesn't it, as being  
19          likely the one and the same perpetrator?

02:40 20          A           As I said before, I don't have any personal  
21          recollection of this --

22          Q           I appreciate that.

23          A           -- this situation, and I think it has to be  
24          weighed into this particular thing.  While I was  
02:40 25          obviously present when some of these discussions



1           were taking place, I was not in a position that I  
2           was in control of the investigation and I think  
3           that makes a difference. If you are in control of  
4           an investigation, your attention to these issues  
02:40 5           would be far more emphasized and far more  
6           specific.

7           Q           But as you look at it now, sir --

8           A           Yes.

9           Q           -- forget what you did and didn't know and what  
02:40 10           you knew fully and didn't know fully --

11          A           Well, my purpose was just to identify my position  
12           and my role that I played there.

13          Q           You told us it repeatedly and I don't think you  
14           need to keep repeating it, but going back to  
02:41 15           looking at it now, sir, the (V4)---- (V4)--- event  
16           stands out as being a situation where it's pretty  
17           hard to believe that the perpetrator of the Gail  
18           Miller murder wasn't also the perpetrator of the  
19           (V4)---- (V4)--- assault; wouldn't you agree?

02:41 20          A           I would agree, yes.

21          Q           Now, you have -- having said, you don't have to  
22           keep saying, talking about your limited role,  
23           there is one comment I would just like to make or  
24           pass by you on your limited role, sir, because  
02:41 25           despite your disclaimer as to your knowledge of



1 the case, I have to come back to you with your  
2 testimony yesterday that you and Short were the  
3 ones who convinced Inspector Wood, or  
4 Superintendent Wood that David Milgaard was the  
02:42 5 good suspect, so you must have known something  
6 about the case if you were going to take on that  
7 role with Short; right?

8 A Right.

9 Q So clearly you had some pretty good knowledge of  
02:42 10 the case that you could say that from what you  
11 knew, this chap, David Milgaard, is our best  
12 suspect? That's what you convinced Wood who was  
13 saying I don't think he is; right?

14 A Well, up until that point we had absolutely  
02:42 15 nothing, we didn't have any suspects, and as I  
16 explained yesterday, the whole purpose was that we  
17 had to have another look at Milgaard and company.

18 Q Uh-huh. It's a little more than that, because I  
19 don't think you suggested that Superintendent Wood  
02:42 20 was saying let's ignore David Milgaard, it's more  
21 you told us how you and Short convinced  
22 Superintendent Wood that Milgaard was the suspect,  
23 the best one you had.

24 A Well, I think we proposed -- we proposed the  
02:43 25 elements and the facts that we were aware of which



1 certainly didn't exclude David Milgaard.

2 Q Which, as it turned out, was a pretty significant  
3 role that you played as we now look back 36 years  
4 and see what happened as a result of that decision  
02:43 5 that Milgaard was the chap to look at; right?

6 A Of course, but you have to remember that all those  
7 things were subjected to the verification by a  
8 Crown prosecutor, later subjected to a Court that  
9 convicted and appeals denied.

02:43 10 Q Sorry, you are being very defensive, Mr. Penkala.

11 A Of course I'm defensive.

12 Q All right.

13 A You are suggesting that we somehow had the option  
14 to pursue this thing in a different light. We had  
02:43 15 absolutely nothing else. This was what was  
16 staring at us and was glaring at us and I agreed  
17 with you that those rapes, there were  
18 similarities, I agreed with you on that, but we  
19 didn't have anybody to connect with the rapes and  
02:44 20 obviously David Milgaard wasn't responsible for  
21 the rapes.

22 Q Commission Counsel described May 16th, I think, as  
23 being a fork in the road; do you remember, sir?

24 A I remember that being said, yes.

02:46 25 Q Yes. I might suggest to you, equally, it could be



1 called a turning point in the case; would you  
2 agree?

3 A It could be viewed that way, yes.

4 Q And, as it turned out, dictated events for right  
02:46 5 up to the present day, as it turned out; correct?

6 A Yes.

7 Q And as you have said, sir, this turning point of  
8 May 16th took place 3 1/2 months after the murder  
9 of Gail Miller; correct?

02:46 10 A Yes, approximately, yes.

11 Q Almost precisely, actually May 16th, --

12 A Yes.

13 Q -- it's actually 3 1/2 months.

14 A Yes.

02:47 15 Q When, until that point, the police seemed to be  
16 getting nowhere in terms of identifying the  
17 culprit; correct?

18 A That's right.

19 Q Except, as I think Commission Counsel pointed out  
02:47 20 to you, identifying the culprit as, to use  
21 Rasmussen's words, as there being a strong  
22 possibility that the culprit was also the culprit  
23 in the 1968 sexual assaults; correct?

24 A At that point --

02:47 25 Q Yes?



1 A -- that was a possibility, yes.

2 Q And this, sir, was in a very heinous crime, if I  
3 can put it that way; you don't get worse than  
4 rape/murders?

02:47 5 A That's correct.

6 Q Perhaps if you can, if you want to compare,  
7 rape/murders of children might arguably be said to  
8 be even worse than rape/murders of women, but  
9 rape/murders of women are just as bad as it gets;  
10 fair?

11 A I would to have agree with you, yes.

12 Q And consequently not only was it a case that you,  
13 and no doubt the other members of the Saskatoon  
14 Police Force, desperately wanted to solve; is that  
02:48 15 correct?

16 A It's always a challenge for police officers.

17 Q More than that. You, personally, you no doubt had  
18 personal wishes to solve this?

19 A Well I --

02:48 20 Q More than just professional wishes, but personal  
21 wishes to catch the man who did this?

22 A Of course.

23 Q Of course. Just a case of a human being, really,  
24 isn't it?

02:48 25 A Well, yes, of course.



1 Q And at the same time, in the same context, sir, it  
2 was a very high-profile case in the City of  
3 Saskatoon; is that right?

4 A Yes.

02:48 5 Q And if you look, sir -- and perhaps you'll just  
6 take my word for this -- at the kinds of cases  
7 which are likely or which so often result in  
8 wrongful convictions, this, as it turns out, was  
9 the classic kind of situation you were in on May  
02:49 10 the 16th; a high-profile, disgusting crime where  
11 the police just didn't seem to be solving the  
12 crime. Does that surprise you, sir, that that is  
13 the kind of crime that you often find results in a  
14 wrongful conviction?

02:49 15 A Well I wouldn't know about the facts that you are  
16 relating but, of course, that is always a  
17 possibility.

18 Q You can see how it can happen in the kinds of  
19 circumstances that you were in -- and I really  
02:49 20 don't mean this as criticism, all right, I want  
21 you to understand that -- you can see how that  
22 kind of, the kind of thing, experience that you  
23 were facing as a group of police officers on May  
24 the 16th of 1969 can lead to a terrible turn which  
02:49 25 turns out to be the wrong turn; do you see that,



1 sir?

2 A Yes.

3 Q One of the things I'm going to take you through  
4 later, but I don't want to interrupt the Fisher  
02:50 5 crimes which is really what I am talking about  
6 now, one of the things I want to do later in the  
7 cross-examination, sir, is show you that exactly  
8 the same thing happened in the prosecution of Guy  
9 Paul Morin which led to some recommendations from  
02:50 10 the Commissioner that I am going to ask you about  
11 in that particular Inquiry. You are obviously  
12 aware of that case, am I right, sir?

13 A Yeah, in a very general sense.

14 Q Now at that meeting, sir, you told us yesterday  
02:50 15 that there was a group consensus developed -- I  
16 think the 'group consensus' were your words --  
17 that the witnesses Wilson and John were lying; do  
18 you remember saying that, sir?

19 A Something along those lines, yes.

02:50 20 Q You said in your examination-in-chief that  
21 obviously -- or in the Commission Counsel's  
22 examination -- 'obviously, in their first  
23 interviews, the two witnesses', meaning Nichol  
24 John and Ron Wilson, 'hadn't said a lot about what  
02:51 25 they had done in Saskatoon'; do you remember





1 saying that yesterday?

2 A Yes.

3 Q Of course, in saying that, you were presupposing  
4 that they hadn't told the truth in their original  
02:51 5 statements, correct, because in their original  
6 statements they had described exactly what they  
7 did from the moment they arrived in Saskatoon to  
8 the moment they left Saskatoon; right?

9 A Of course.

02:51 10 Q Yes, all right. So that was another way of saying  
11 that 'we, as a group of officers, on May 16th came  
12 to the conclusion that John and Wilson were lying  
13 and, in fact, they were either implicated in or  
14 knew that their companion, David Milgaard, had  
02:51 15 committed the murder/rape of Gail Miller';  
16 correct?

17 A I don't -- well I think, I think there is a, there  
18 is a point here that needs to be brought out.  
19 While we were advocating the return of these  
02:51 20 witnesses and the return to these witnesses, we  
21 were not suggesting that they were responsible  
22 for, for the murder. I think that all had to be  
23 proven and, at that stage, it wasn't -- these were  
24 theories and some fact that we knew, but, but  
02:52 25 these are unproven facts, so we were not



1 approaching this on the basis that this is a done  
2 deal.

3 Q No, but you said the group consensus was that they  
4 were lying, and presumably the group consensus was  
02:52 5 logically, having decided that they were lying,  
6 that they could only be lying for one reason;  
7 because, in one way or another, they were  
8 implicated in the homicide?

9 A But that's a pretty general, that's a pretty  
02:52 10 general response to people that might be involved  
11 in a crime.

12 Q Okay, I don't -- I'm not sure what you mean? You  
13 said --

14 A You don't have criminals jumping up and telling  
02:53 15 you that they are responsible.

16 Q No, but if your group has decided to a person --  
17 to a man, actually, I think you were all men -- if  
18 your group has decided by way of consensus that  
19 Nichol John and Ronald Wilson were lying in their  
02:53 20 statements to the police, it doesn't seem to be a  
21 giant step from there from saying that the group  
22 consensus likewise was that the reason they were  
23 lying was because they were obviously, in some  
24 way, involved in the homicide?

02:53 25 A Well that inference was obviously there.



1 Q It's the only reason to --

2 A But what I am suggesting is that that's all  
3 subject to some further tests.

4 Q Oh, yeah, indeed. You wrote out what you were  
02:53 5 going to do and -- and I don't, I mean 'you'  
6 generically -- you wrote out what you were going  
7 to do from there and 'you', generically, wrote out  
8 your theory as to what the lies were; correct?

9 A Yes.

02:53 10 Q On that document? So --

11 A And we also, we also solicited the assistance of a  
12 polygraphist --

13 Q Right?

14 A -- so that we could confirm the statements of  
02:54 15 these people.

16 Q And was it during this meeting that you convinced  
17 Superintendent Wood that Milgaard was the man?

18 A No, it wasn't that --

19 Q Before this or after?

02:54 20 A No, I think there was a meeting before that.

21 Q Before that?

22 A But --

23 Q So Wood is already onside by the time of the  
24 meeting on May 16th?

02:54 25 A Well, I don't know whether he was onside, but



1           there is a -- when Mr. Short and myself went to  
2           see Superintendent Wood, it was a brainstorming --

3           Q       Right?

4           A       -- type of situation. We recognized that  
02:54 5           Superintendent Wood wasn't convinced and we went  
6           back to see him and pointed out some of the  
7           issues, is it a coincidence and so on and so  
8           forth, and I think at that point he decided that,  
9           yes, we better, we better follow this up and --

02:55 10          Q       You know, I forget, was Detective Karst at the May  
11          16th meeting? I simply can't remember.

12          A       I don't believe he was.

13          Q       He wasn't? All right.

14          A       But I, I don't know, it's recorded by Mr. Riddell.

02:55 15          Q       No, he wasn't? Okay. Because one of the  
16          documents that I would think at least some of you  
17          if not all of you were privy to, sir, was an  
18          opinion of Detective Karst in which he suggested  
19          that he thought Nichol John had told him the  
02:55 20          truth; do you remember that?

21          A       Not specifically, no.

22          Q       If we look at, sir, 106661, please, 106661, and  
23          then go to 106662. Is that 626 or 661?

24                   MR. HODSON: It's a different version.

02:56 25                   MR. LOCKYER: Oh, I'm sorry, all right. I



1           have done that again, have I.

2           BY MR. LOCKYER:

3           Q       If you look, sir, just at this little bit here,  
4           sir, if that can be enlarged, you'll see it says  
02:56 5           that:

6                       "Although ...",  
7           this is Karst writing on April 18th, 1969, sir,  
8           so we're a month before your meeting, a couple of  
9           days less than a month before your meeting, and  
02:56 10          no one has spoken to Nichol John between this  
11          date of April 18th when Karst wrote what he wrote  
12          and May 16th. And what he wrote is that:

13                       "Although there are many unanswered  
14           questions with regards to Milgaard's  
02:56 15          activities on that particular morning,  
16          if one is to believe the girl, Nichol  
17          John, and it appears that she is very  
18          convincing with her story, then there is  
19          no way in which Milgaard could be  
02:56 20          connected with this crime."

21          A        I --

22          Q        You would have to, if you had had that opinion  
23          before you May 16th --

24          A        I think the key there --

02:57 25          Q        -- you would discount -- I'm sorry?



1 A I think the key in that paragraph is 'unanswered  
2 questions'.

3 Q Okay. If you read the rest of the report, sir, I  
4 think you would find an absence of unanswered  
02:57 5 questions being listed by Detective Karst, but he  
6 doesn't tell us what those are.

7 A Well it carries into 'very convincing' but --

8 Q Suffice to say, sir, if you had that before you as  
9 a group on May 16th you would seem to have  
02:57 10 rejected the opinion of Karst that he found her  
11 very convincing and that there was no way in which  
12 Milgaard could be connected with the crime? You  
13 made your decisions in spite of that opinion, put  
14 it that way, is that fair?

02:57 15 A I don't, I don't recall this --

16 Q All right.

17 A -- being before that group.

18 Q The chap who interviewed Wilson, sir, Ronald  
19 Wilson, had not quite so definitively, but if we  
02:57 20 look at 009238 and go to 239 of the report, you  
21 are looking at a report by Walters of the Regina  
22 police, I think I'm right in saying, on March 2nd,  
23 '69. If we go to the next page which is  
24 backwards, 238, it's the second page of the  
02:58 25 report, you will see at the top there, sir, if we



1 could just enlarge (5):

2 "The four previously mentioned persons

3 arrived back in Regina ...",

4 that would be Cadrain, Wilson, John, and

02:58 5 Milgaard, all right:

6 "... arrived back in Regina February 6,

7 and from that point on went their

8 separate directions. From the statement

9 obtained from Wilson, nothing of an

02:58 10 incriminating or relevant nature was

11 noted. Wilson was convinced that

12 Milgaard was in no way involved in the

13 murder of Gail Miller, nor could he be

14 of any further assistance."

02:58 15 So sort of reading between the lines of what's

16 written there, sir, it would seem that the

17 officer drafting that report, Walters, is not

18 signaling, at least, that he found cause to

19 disbelieve what Mr. Wilson had told him; is that

02:58 20 fair?

21 A Well it would appear that way --

22 Q Right.

23 A -- from the report.

24 Q The man on the spot, in other words --

02:59 25 A But investigators don't always accept --



1 Q No, I understand. And, indeed, on May 16th that's  
2 what you didn't do, you didn't really accept the  
3 opinions of the men on the spot; is that fair?

4 A Umm, could very well be.

02:59 5 Q Uh-huh?

6 A I don't recall this report ever being before that  
7 group. I think the group was dealing with  
8 generalities at that particular point, and  
9 certain, certain facts were brought forward, which  
02:59 10 obviously had not been answered, and of course  
11 then the decision was made to continue with the  
12 Milgaard group.

13 Q And a big part of this, sir, am I not right in  
14 saying, is that we're 3 1/2 months down the road  
02:59 15 and the police just don't seem to be getting  
16 anywhere?

17 A Well, that's true.

18 Q And in fact as well, by way of trying to explain  
19 how the three sexual offences in 1968, and  
03:00 20 presumably (V4)--- as well, sort of get set to one  
21 side now despite what's previously been written,  
22 you said in chief that 'the concentration now',  
23 meaning on May 16th, 'the concentration now was on  
24 the specific offence', meaning the rape/murder of  
03:00 25 Gail Miller; is that right?





1 A Yes.

2 Q Which is a conclusory statement, isn't it sir,  
3 rather than a explanatory statement? You have  
4 concluded that that's all you're -- you have  
03:00 5 concluded that that's what you're going to focus  
6 on rather than explained why you are only going to  
7 focus on and sort of put the other crimes to one  
8 side?

9 A Well you can certainly view it in that type of  
03:01 10 fashion.

11 Q Uh-huh?

12 A But I don't know how you could positively approach  
13 an investigation without taking those kinds of  
14 initiatives.

03:01 15 Q Well I suppose you, the way you might have done it  
16 is to say 'well, you know, we've got reports from  
17 the interviewer of Wilson, of Mr. Wilson; a report  
18 from the interviewer of Ms. John, both of which  
19 seem to give them some credibility, the authors of  
03:01 20 the reports --'

21 A Well the interpretation --

22 Q '-- give them some credibility --'

23 A The interpretation is --

24 Q -- let me finish, let me finish for a moment. So  
03:01 25 bearing that in mind, and bearing in mind that Mr.



1 Milgaard is from Regina and therefore it seems  
2 pretty unlikely he is sort of coming here every  
3 now and then to carry out a sexual offence and  
4 then go back to Regina, maybe that's a pretty good  
03:01 5 reason, taking into account all those other  
6 crimes, to say that David Milgaard is not a good  
7 suspect? Do you see the point?

8 A Well I see your point, yes.

9 Q That's not what you did but I -- that's, back then  
03:02 10 your conversation on May 16th could have gone that  
11 way, could it not?

12 A Well it could have gone that way.

13 Q Yes?

14 A And we would --

03:02 15 Q And it wouldn't have been unreasonable for it to  
16 have gone that way, wouldn't you agree, sir?

17 A Well, it may not have been unreasonable to go in  
18 that direction, but --

19 COMMISSIONER MacCALLUM: Yes, Ms. Knox?

03:02 20 Oh, I'm sorry, finish your answer? I didn't mean  
21 to interrupt, I'm sorry to cut you off.

22 A Sorry, I lost it.

23 COMMISSIONER MacCALLUM: You lost it?

24 Okay.

03:02 25 MS. KNOX: Sorry, my timing is bad, but I'm



1 not so much making an objection but making a  
2 suggestion; that in putting these questions to  
3 former chief Penkala about what they did on May  
4 16th and what information they didn't have, the  
03:02 5 one factor that's been consistently not included  
6 in that list is that they had the March statement  
7 of Albert Cadrain that said he had seen Mr.  
8 Milgaard in his house that morning with blood on  
9 his clothes, so I think that needs to be put on  
03:03 10 the table, the thought processes, if I can use  
11 that phrase, that may have happened at the May  
12 16th in determining the process to follow?

13 COMMISSIONER MacCALLUM: Yes, it should be  
14 put, but don't you think you will have that  
03:03 15 chance when it's your turn for cross-examination,  
16 Ms. Knox?

17 Perhaps it's a good place to  
18 adjourn, Mr. Lockyer.

19 *(Adjourned at 3:03 p.m.)*

03:03 20 *(Reconvened at 3:21 p.m.)*

21 BY MR. LOCKYER:

22 Q Another document, sir, of relevance to your May  
23 16th meeting, 105501 please, was, although it's  
24 not entirely clear I think it seems to be  
03:21 25 reasonably common acceptance was prepared by one



1 of the people at your meeting, Inspector Riddell,  
2 and he wrote it on March the 3rd of 1969, two  
3 months plus before your meeting. Look at item  
4 (5), sir:

03:21 5 "During the interview with Wilson, he

6 "...",

7 meaning Wilson:

8 "... appeared straightforward with  
9 nothing to hide."

03:22 10 And then proceeds to give a sort of a synopsis of  
11 some of the things that he had said in his  
12 statement. Do you remember, sir, Riddell saying  
13 anything about that at the meeting, that that was  
14 his impression of Wilson, but maybe he was wrong?

03:22 15 A I don't have recollections of that specifically.

16 Q And whilst I have suggested to you, sir, that you  
17 have, as a group you seemed to have put the  
18 previous sexual attacks to one side in the course  
19 of this meeting, even that's not entirely true  
03:22 20 because if we go back -- and I think I've already  
21 made, we've had reference to this -- if we go back  
22 to 001499, the smoking gun document, as I pointed  
23 out the attack on (V1)--- (V1)- is indeed very  
24 much a part of this document; is that right?

03:23 25 A Yes.



1 Q So how, do you remember how that fit into the  
2 conversation, sir? Because, what, was there a  
3 suggestion -- I mean once you bring the (V1)-,  
4 Ms. (V1)-'s attack into the equation you are  
03:23 5 almost by definition bringing in the (V2)-----  
6 attack, aren't you as well, and the (V3)-----  
7 attack? It seems unlikely that you are going to  
8 have one assailant carrying out the (V1)- attack  
9 and the Gail Miller attack and someone else doing  
03:23 10 the (V2)----- and the (V3)-----; don't you think?

11 A That's reasonable, yes.

12 Q Yes, it seems pretty unlikely, so did -- was it  
13 discussed at this meeting, sir, that -- that there  
14 is a real problem here, then, if Mr. Milgaard is  
03:23 15 taken to be the perpetrator, because that would  
16 mean he would have to keep coming in and out of  
17 Saskatoon to commit rapes, now you have got the  
18 (V1)- one as a part of your discussion for sure?

19 A I don't have any recollection of that type of  
03:24 20 conversation being carried on at that particular  
21 meeting.

22 Q Because as of May 16th and thereafter, sir, in the  
23 police reports -- and there are plenty more filed  
24 in relation to this investigation after May  
03:24 25 16th -- the previous sexual attacks and the



1 subsequent sexual attack on (V4)---- (V4)--- ,  
2 albeit only by 20 minutes, never receives, I think  
3 I'm right in saying, another mention in a police  
4 report. It's as if they disappeared off the face  
03:24 5 of this investigation?

6 A I tend to agree with you on that, yes.

7 Q And you have -- really the only explanation for  
8 that is -- and I'm going to put this to you as a  
9 suggestion -- is that you had all -- and I say  
03:25 10 'you' generically, you were a part of it albeit  
11 not as much a part of it as someone like Mackie  
12 might have been and some of the others -- you had  
13 all decided David Milgaard was the perpetrator of  
14 the murder of Gail Miller and, since it makes no  
03:25 15 sense he committed these other attacks, then we  
16 can eliminate them as being part of the Gail  
17 Miller murder investigation?

18 A Well, that's, that's one approach. I think the  
19 other approach is to, to pursue what you already  
03:25 20 know and establish it to your satisfaction either  
21 in a positive sense or in a negative sense, either  
22 eliminate or establish. That's another view.  
23 And, of course, we're dealing with the issues  
24 relative to the, and I'll call them the Milgaard  
03:25 25 group.



1 Q But isn't that the reasonable explanation, sir,  
2 for why these other attacks ceased to be mentioned  
3 in police reports after May 16th?

4 A Oh, I think that's, I think that's appropriate to  
03:26 5 suggest, that when you are concentrating on a  
6 particular group of people in the efforts to  
7 establish or dispel their relationship, you would  
8 obviously ignore the other things that don't seem  
9 to play a part.

03:26 10 Q And if you look, sir, at the sort of the -- how  
11 would I put it -- the theory as to what happened  
12 to Gail Miller at the hands of David Milgaard and  
13 his friends on January 31st, 1969, in other words  
14 the, where the theorizing takes place -- you know  
03:26 15 the part of the document I'm talking about --

16 A Yes.

17 Q -- that theorizing, sir, doesn't even attempt to  
18 take into account the assault on (V4)---- (V4)---;  
19 does it?

03:27 20 A No.

21 Q No attempt at all?

22 A No. But, at the same time, those are theories, --

23 Q They are --

24 A -- and it goes to back to my suggestion that  
03:27 25 there's a particular -- there's one way of looking



1 at it, there's another way of looking at it, and  
2 these were theories that were aired at this  
3 particular meeting and it was obviously decided  
4 that we would attempt to establish, one way or  
03:27 5 another, the involvement of the  
6 Wilson/John/Milgaard situation.

7 Q All right. But understand my point, sir. If you  
8 -- the theory is set out mostly at 001502, to  
9 stick to the document we were at, so we're back to  
03:27 10 the first page of it; right? The theories that  
11 are set out, and most of them are set out on this  
12 particular page of the smoking-gun document, sir,  
13 whoever put them forward -- and as best I can tell  
14 they were sort of adopted, so to speak, at your  
03:28 15 meeting on May 16th; is that fair?

16 A I think that's fair, yes.

17 Q All right. Meant that as a group, talking of a  
18 consensus, there was a group consensus really by  
19 definition that the perpetrator of the (V4)---  
03:28 20 assault had to have been a different person than  
21 the person who raped and murdered Gail Miller?  
22 That seems to have been effectively assumed on May  
23 16th?

24 A By it's --

03:28 25 Q That's --





1 A By its absence, I guess.

2 Q By her absence?

3 A By the absence on this summary.

4 Q That's what I am saying, yes.

03:28 5 A Yes.

6 Q So I don't know whether you realized it or not as  
7 a group on May 16th, but on May 16th you, as a  
8 group of senior officers, seemed to, at least as  
9 best I can tell you seem to have made an  
03:28 10 assumption or each drawn a conclusion, if I can  
11 take it that far -- maybe that's taking it one  
12 step too far -- but at the very least made an  
13 assumption that on the early morning hours of  
14 January 31st, 1969, in minus 40 degrees  
03:29 15 Centigrade, you had two sexual assaulters roaming  
16 the streets of Saskatoon within five blocks of  
17 each other --

18 A Well I --

19 Q -- at the same time?

03:29 20 A Well, I'm not sure that that other, I'm not sure  
21 if that's even mentioned in this summary, that --

22 Q Well, it's not, that's the point.

23 A Well --

24 Q It's not mentioned in the summary and it's absent  
03:29 25 in the summary.



1 A Yeah.

2 Q That effectively means you must have decided that  
3 there were two different people roaming the  
4 streets of Saskatoon that morning sexually  
03:29 5 assaulting one woman each?

6 A Well, one could come to that conclusion, but it  
7 was not the object of this particular  
8 brainstorming, theorizing, and attempt to have a  
9 direction in which to go with the investigation of  
03:30 10 the Miller murder.

11 Q Oh, but it's -- I have to disagree with you, sir.  
12 As a bunch of brainstormers you surely have to  
13 take into account the known facts, and the known  
14 facts is that Gail Miller is raped and murdered at  
03:30 15 about quarter to 7:00 in the morning, (V4)----  
16 (V4)--- is attacked five blocks away -- or I think  
17 it may have been six but we'll call it five for  
18 the sake of an argument -- a matter of 20 minutes  
19 later, so either the same person did it or two  
03:30 20 different people committed those assaults. Our  
21 theory, as presented in this document, is that it  
22 has to have been two different people because our  
23 theory doesn't allow for David Milgaard to have  
24 committed the second assault on (V4)---- (V4)---.  
03:30 25 Don't you see the point?



1 A Well there's an --

2 Q It's a matter of logic.

3 A There's an assumption that we knew about the, that  
4 latest, that latest assault.

03:30 5 Q You did. I have already put that. I have already  
6 showed you how you did.

7 A But --

8 Q Both the Saskatoon Police and the RCMP knew.

9 A But was it the -- was it the subject of this  
03:31 10 particular meeting? I'm not sure that it was. I  
11 don't recall it being brought up at that meeting.

12 Q I thought you had acknowledged it must have been  
13 brought up at that meeting --

14 A Well I --

03:31 15 Q -- because it was so pertinent?

16 A -- I did acknowledge on your suggestion that it  
17 should have been acknowledged, but I'm -- I don't  
18 have any recollection. This happened 35 years  
19 ago, --

03:31 20 Q I understand.

21 A -- and I didn't take any notes, and it would be  
22 probably unrealistic to take notes at that type of  
23 a meeting.

24 MR. ELSON: Mr. Commissioner, I wonder if I  
03:31 25 might address the Commission for a moment.



1 My Friend has been putting  
2 certain facts and certain propositions and  
3 certain assumptions to chief Penkala, and in  
4 fairness my recollection of chief, former chief  
03:31 5 Penkala's evidence was that he thought it was  
6 possible the (V4)--- matter was discussed at the  
7 meeting of May 16th, but he certainly had no  
8 recollection of it and it's certainly not in  
9 Inspector Riddell's report.

03:32 10 The other thing that has to be  
11 borne in mind is that while there was definitely  
12 a complaint from (V4)---- (V4)--- we have to  
13 recognize that no charges, as I recall it, were  
14 laid with respect of the (V4)--- matter and My  
03:32 15 Friend is putting to this witness as a matter of  
16 fact that the assault, indeed, occurred. Now,  
17 having said that, it may very well be at the end  
18 of the day, Mr. Commissioner, you will come to  
19 the conclusion that, indeed, it did occur, but at  
03:32 20 this point in time there has never been a fact  
21 found judicially or otherwise that Ms. (V4)---  
22 was indeed attacked or that she was, indeed,  
23 attacked by Larry Fisher.

24 So, to some extent, we have to  
03:32 25 bear in mind that this is very different from the



1 (V1)-/(V2)-----/ (V3)----- and (V5)--- matters  
2 where there has been a finding of fact, namely  
3 with a plea of guilt, that those offences did in  
4 fact occur. And I think, in fairness to this  
03:32 5 witness, it -- that has to be borne in mind and  
6 the context of that has to be borne in mind.

7 COMMISSIONER MacCALLUM: Well, Mr. Elson,  
8 the fact of the matter is, indisputably, that  
9 there was a complaint by (V4)---- (V4)--- on the  
03:33 10 very same day of the murder of being sexually  
11 assaulted in the manner described, so whether or  
12 not it was proven later I don't think matters to  
13 --

14 MR. ELSON: No, I appreciate that.

15 COMMISSIONER MacCALLUM: -- what he is  
16 trying --

17 MR. ELSON: But the problem, of course, is  
18 that My Friend, in putting this to former chief  
19 Penkala in the manner that he is, he is saying  
03:33 20 that, of necessity, the individuals at that  
21 meeting must have concluded 'the facts are that  
22 there were two sexual assaults by two different  
23 perpetrators five blocks away'. With the  
24 greatest of respect, that assumes that the  
03:33 25 (V4)--- assault has been proved; it hasn't.



1                   COMMISSIONER MacCALLUM: Yeah. When you  
2 rose I was looking for the reference. Just bear  
3 with me for a moment, sir, I'll see if I can find  
4 it.

03:33 5                   MR. LOCKYER: Yes, Mr. Commissioner.

6                   COMMISSIONER MacCALLUM: Well he began by  
7 saying that the report of the (V4)--- attack,  
8 about Detective Bennett on the 31st of January,  
9 1969, might have been discussed on May the 16th  
03:34 10 but he doesn't recall, he hasn't seen the report,  
11 and then it was pointed out to him that the RCMP  
12 obviously knew about it and he referred to the  
13 Rasmussen report, so both Saskatoon and the RCMP  
14 knew about it, so it probably got discussed on  
03:34 15 May the 16th, and he agreed with that.

16                   MR. ELSON: And I appreciate that.

17                   COMMISSIONER MacCALLUM: Yes.

18                   MR. ELSON: And I don't mind My Friend  
19 putting it to the -- and I think it should fairly  
03:34 20 be established.

21                   COMMISSIONER MacCALLUM: Yes.

22                   MR. ELSON: If he were to put it to former  
23 chief Penkala 'was it the conclusion of the  
24 individuals at that meeting that, indeed, the  
03:34 25 (V4)--- assault had in fact occurred, that this



1 complaint would probably be proven, that this  
2 complaint was somehow true', then it would  
3 perhaps be somewhat more fair for My Friend to  
4 put the factual proposition he does. But there  
03:34 5 was never, I don't believe there has been, ever,  
6 any evidence before this Commission of Inquiry  
7 that anyone within the Saskatoon Police Service  
8 at the time made a finding that yes, indeed, this  
9 particular complainant was assaulted and that  
03:35 10 this was something that could be proved, nor was  
11 it ever determined subsequently because no  
12 charges were laid. So, in this respect, I submit  
13 that this is different from the other matters  
14 because, in the other matters with respect to  
03:35 15 (V1)-(V2)-----, etcetera, there is a specific  
16 factual determination that yes, indeed, those  
17 women were assaulted by one specific perpetrator.  
18 That's not been found with respect to the  
19 complaint.

03:35 20 It's fair for My Friend to say  
21 'assuming it's true' or 'did you come to the  
22 conclusion that that complaint was true', that's  
23 fair, and under those circumstances it would be  
24 appropriate to put the questions in that context.

03:35 25 MR. LOCKYER: I'm sorry, in 1969 when they



1 are having their meeting there has been no,  
2 quote, "finding" by the Saskatoon Police that  
3 (V1)--- (V1)- was raped, there has been no,  
4 quote, "finding" that (V2) (V2)- (V2)----- was  
03:36 5 raped. I think everyone assumed that they had,  
6 in the Saskatoon Police, just as they did with  
7 (V4)---- (V4)---. They didn't think, there's  
8 nothing in the police reports to suggest that  
9 (V4)---- (V4)---, they thought she had  
03:36 10 manufactured a non-existent sexual assault  
11 complaint. It's a bit bizarre, I'm sorry, what  
12 My Friend is saying, I don't really comprehend it  
13 but --

14 COMMISSIONER MacCALLUM: Certainly the  
03:36 15 complaint was there and it was there to the  
16 knowledge of the Saskatoon Police.

17 MR. LOCKYER: And there was no --

18 COMMISSIONER MacCALLUM: So if Mr. Elson  
19 objects that you shouldn't put it as a proven  
03:36 20 fact I suppose he has --

21 MR. LOCKYER: Well I should no more put the  
22 (V1)- rape as a proven fact if it's the fact of  
23 someone being charged which makes it true, which  
24 it doesn't, of course.

03:36 25 COMMISSIONER MacCALLUM: We're interested





1 in what was in the minds of the police at the  
2 time.

3 MR. LOCKYER: Right.

4 COMMISSIONER MacCALLUM: And the witness  
03:36 5 has also agreed that it probably was discussed at  
6 the meeting.

7 MR. LOCKYER: Indeed.

8 COMMISSIONER MacCALLUM: Not definitively  
9 but --

03:37 10 MR. LOCKYER: Let me, let me carry on, sir,  
11 then.

12 BY MR. LOCKYER:

13 Q So you seem to have sort of backtracked a little  
14 bit, and I don't mean that to be offensive, on  
03:37 15 what you said before the recess. Do you not  
16 think, sir -- and I think you agreed with this  
17 before recess -- that as a group of officers, all  
18 of whom are at the top of their profession or  
19 getting towards the top of their profession --  
03:37 20 perhaps you were the only exception to that, you  
21 were fairly, you were up and coming, so to speak,  
22 back in 1969; right?

23 A Yeah, pretty --

24 Q That the others had come, if I can put it that  
03:35 25 way. It's hard to believe, isn't it, sir, that



1 they wouldn't have factored into the equation of  
2 who killed Gail Miller, who attacked (V4)----  
3 (V4)--- 20 minutes later, it's hard to believe  
4 they wouldn't have factored that in isn't it?

03:36 5 A It's logical to think in those terms, yes.

6 Q It certainly is. But to finish this, that  
7 document, the smoking gun document which was  
8 drafted before the meeting and was essentially  
9 endorsed in the meeting, as you've agreed, makes  
03:36 10 no reference to, it takes no account of the  
11 assault on (V4)---- (V4)---; correct?

12 A Yeah, that's quite obvious.

13 Q So I guess to go back to how Commission Counsel  
14 finished with you this morning, you might say the  
03:36 15 one thing that you might do differently if you  
16 were able to retrace your steps is at least on the  
17 16th of May say to yourselves, 'well, what about  
18 (V4)---- (V4)--- being attacked 20 minutes later,  
19 how does that fit into our Milgaard theories?'  
03:37 20 You agree?

21 A Well, I can certainly agree with you, but there's  
22 another -- there's another position on this as  
23 well.

24 Q That someone else assaulted her other than the  
03:37 25 murderer of Gail Miller?



1 A Well, that's always a possibility as well, that --

2 Q Right. That's where the David Milgaard theory  
3 comes in.

4 COMMISSIONER MacCALLUM: He was trying to  
03:37 5 say something. Isn't it a possibility you said  
6 that --

7 A Well, I was just responding to the question and he  
8 was wanting me to agree with his statement and I  
9 said yes, that's one possibility, but there is  
03:37 10 another possibility, there may have been another  
11 person that was responsible for the assault that  
12 took place. I don't know.

13 COMMISSIONER MacCALLUM: For (V4)---'s  
14 assault?

03:37 15 A That's right.

16 COMMISSIONER MacCALLUM: Uh-huh.

17 BY MR. LOCKYER:

18 Q So really this document, the smoking gun document  
19 is, at least as far as I can tell, our last  
03:38 20 reference to any other of the sexual assault  
21 incidents that had taken place up to and including  
22 (V4)---- (V4)--- in the Gail Miller file, this is  
23 the last document that makes any reference to it;  
24 is that right, sir, as far as you know, and  
03:38 25 certainly as far as I know?



1 A To the rapes?

2 Q It refers to one of them, remember, (V1)--- (V1)-.

3 A To the rapes, yeah.

4 Q Right, okay. Now, if we then move on a stage,  
03:38 5 sir, because that then leads us into ultimately  
6 the May 22nd to 24th interviews, if you will, of  
7 Nichol John and Wilson and the arrest of Milgaard  
8 and so on and so forth, as far as you are aware,  
9 sir, the Crown, Mr. Caldwell, the prosecutor of  
03:38 10 this case, would have had in his possession the  
11 fact first of all of the police theory, at least  
12 prior to May 16th and arguably at May 16th if we  
13 include the (V1)--- (V1)- reference in the smoking  
14 gun, Mr. Caldwell should have been aware of the  
03:39 15 police theory that whoever killed Gail Miller  
16 might well also have been the perpetrator of the  
17 sexual assaults back in 1968?

18 A I'm not aware of whether Mr. Caldwell would have  
19 known that. I have --

03:39 20 Q Well, you said -- sorry?

21 A I have, I doubt very much if that issue would have  
22 been brought to my Caldwell's attention at that  
23 point.

24 Q Well, you said he had all the police reports, he  
03:39 25 would have had all the police reports.



1 A Oh, that would have been after there was a  
2 decision to lay charges and seek charges.

3 Q Sorry, we're at cross purposes. That's where I'm  
4 at now, I'm no -- I've moved way up past the  
03:39 5 preliminary hearing even, I'm now sort of  
6 somewhere in the no-man's land between the  
7 preliminary hearing and the trial shall we say, so  
8 by this time, as far as you are concerned, Mr.  
9 Caldwell would have become aware, through what's  
03:40 10 given to him, of the --

11 COMMISSIONER MacCALLUM: I'm sorry, I don't  
12 want to interrupt your question, except that I  
13 understood the time period you were speaking  
14 about was at May 16th or before.

03:40 15 MR. LOCKYER: No, no, no, no, I'm sorry,  
16 then you misunderstand me. I said May 16th, then  
17 we have what happened May 22 to 24, the arrest of  
18 Mr. Milgaard, and then I said, and now you are  
19 saying that Mr. Caldwell, the prosecutor,  
03:40 20 sometime during the pretrial proceedings -- I'll  
21 put it that way to make clear what I'm talking  
22 about --

23 COMMISSIONER MacCALLUM: Please, please.

24 BY MR. LOCKYER:

03:40 25 Q -- would have had, would have known, assuming he



1 read what he was given, would have known about the  
2 police theory pre May 16th that the killer of Gail  
3 Miller may well have been the same person who had  
4 committed the 1968 assaults. Correct?

03:40 5 A I'm not certain that I follow your rationale on  
6 this. The prosecutor would only be approached on  
7 this issue after there would be somewhat of a  
8 prima facie case established.

9 Q We're at cross purposes, sir. Let me give you a  
03:41 10 time, all right. Mr. Milgaard's trial was in  
11 January of 1971; right?

12 A '70.

13 Q '70, sorry, my mistake. 1970, right?

14 A Yes.

03:41 15 Q Am I right in saying that by December of 1969 Mr.  
16 Caldwell would have known of the police theory pre  
17 May 16th that whoever killed Gail Miller had  
18 likely committed, or there was a good possibility  
19 may have committed the rapes in 1968?

03:41 20 A I don't know that of personal input because I was  
21 not directly involved with Mr. Caldwell on those  
22 issues, but I can suggest in a general sense that  
23 the process usually involves presenting the  
24 evidence that is in the hands of the police to the  
03:42 25 Crown prosecutor and even in fact obtaining the



1 verification and the consent of the Crown  
2 prosecutor to proceed with charges.

3 Q I don't quite know where we ended up with that.  
4 Am I right in saying, sir, that as far as you are  
03:42 5 concerned, there's every reason to think Mr.  
6 Caldwell would have known that that was the police  
7 theory pre May 16th by virtue of being able to  
8 read the police reports that would have been given  
9 to him by the police?

03:42 10 A I don't know what Mr. Caldwell would have known.

11 MS. KNOX: If I may, that's not his  
12 evidence. He said he has no personal knowledge  
13 of what was given to Mr. Caldwell and that's why  
14 I would suggest this is as far as this witness  
03:42 15 can go, if he didn't participate in delivery of  
16 either the materials to him or has recollection  
17 of having discussions about particular materials  
18 to him and --

19 COMMISSIONER MacCALLUM: I know that.  
03:43 20 Counsel is trying to get the witness to agree  
21 with a conclusion that is phrased in counsel's  
22 words. The witness has just answered it by  
23 saying I don't know.

24 MS. KNOX: Thank you.

03:43 25 COMMISSIONER MacCALLUM: I can't -- I'm



1           sorry, counsel, but I can't, you know, pass  
2           judgment on the form of cross-examination in  
3           every instance just because somebody doesn't like  
4           it, that's what the purpose of further  
03:43 5           examination is all about. I have to leave a  
6           certain discretion in the hands of the  
7           cross-examiner.

8           BY MR. LOCKYER:

9           Q           Because you did say, sir, when Commission Counsel  
03:43 10           was questioning you, that --

11                    COMMISSIONER MacCALLUM: Excuse me, I just  
12           wanted to bring up one more example. I don't  
13           like the term smoking gun, for example, but it's  
14           counsel's choice to describe such a document if  
03:43 15           he wants to do that, so long as he makes it clear  
16           that it's his word and not anybody else's I  
17           guess.

18                    MR. LOCKYER: Actually, it's not mine, it's  
19           in the --

03:43 20                    COMMISSIONER MacCALLUM: Where is it?

21                    MR. LOCKYER: The Commission calls it that  
22           within their records. That's the point I tried  
23           to make.

24                    MR. HODSON: No, we don't.

03:44 25                    MR. LOCKYER: You do in the left-hand





1 column, it's called the smoking gun.

2 MS. KNOX: No, that's Joanne.

3 MR. HODSON: That would be your co-counsel.

4 MR. LOCKYER: Oh, I'm sorry. Okay, then my  
03:44 5 mistake.

6 MR. HODSON: I would like to clarify we  
7 have never referred to that document as a smoking  
8 gun.

9 MR. LOCKYER: I'm sorry. Are you sure? My  
10 mistake.

11 MRS. MILGAARD: Yes.

12 MR. LOCKYER: Sorry.

13 COMMISSIONER MacCALLUM: I think, sir, it  
14 should be apparent by this time that Commission  
03:44 15 Counsel does not employ extravagant or theatrical  
16 language.

17 MR. WOLCH: Mr. Commissioner, if I can  
18 correct it, that's a term that I coined at the  
19 Supreme Court back in the early '90s and it took  
03:44 20 on a life of its own.

21 MR. LOCKYER: So it seems.

22 COMMISSIONER MacCALLUM: Well, it's not  
23 born again here as far as I'm concerned.

24 BY MR. LOCKYER:

03:44 25 Q You said, sir, when Commission Counsel was



1           questioning you, that to your knowledge, in cases  
2           like this, all police reports prepared on the case  
3           will be passed on to the prosecutor; is that  
4           right?

03:45 5           A           I was generalizing and that's my understanding,  
6           yes.

7           Q           If we assume that that's what happened in this  
8           case, and that's what my question was  
9           presupposing, if we assume that that happened in  
03:45 10          this case as it does normally, then it would be  
11          fair to say that assuming Mr. Caldwell read all  
12          the reports, assuming they were passed to him,  
13          that he would have known the police theory pre May  
14          16th that the perpetrator of the '68 assaults  
03:45 15          could well be the same person who killed Gail  
16          Miller; correct?

17          A           Well, we're going in circles because again I  
18          wasn't there, I don't know what transpired.

19          Q           Well, we have to rely on you for your experience,  
03:45 20          sir. You were a police officer in 1969 in the  
21          Saskatoon Police Service, I wasn't. You say that  
22          in the normal course of events all the police  
23          reports went to the prosecutor, I have to rely on  
24          what you tell me and work off it. Do you see what  
03:45 25          I mean?



1 A Yes.

2 Q Right, okay, and that's all I'm doing, what you  
3 said to Commission Counsel, I'm working off it.  
4 All right?

03:46 5 A Okay.

6 Q As well, sir, if that's true, what you say  
7 happened in cases back in 1969 to your knowledge,  
8 assuming it happened in this case, the Crown, Mr.  
9 Caldwell, would also have known about the (V4)----  
03:46 10 (V4)--- events; am I right?

11 A I would imagine following your reasoning, yes.

12 Q Yes. It's more your reasoning than mine, but fair  
13 enough, yes, sir. Now, tell me, sir, as a defence  
14 counsel, if you can -- as a police officer you've  
03:46 15 dealt with defence counsel over the years many  
16 times I imagine?

17 A Yes.

18 Q And do you think, sir, it would be fair to say  
19 that Mr. Milgaard's lawyer back in 1969, 1970  
03:46 20 would dearly love to have known about the original  
21 police theory that whoever perpetrated the 1968  
22 rapes may well be the person who killed Gail  
23 Miller? Do you think the defence would want to  
24 know that?

03:47 25 A If you are asking for my opinion, yes.



1 Q Yes. Do you think, sir, the defence of Mr.  
2 Milgaard back in 1969, 1970 would have dearly  
3 liked to know that (V4)---- (V4)--- was assaulted  
4 some five or six blocks from where Gail Miller was  
03:47 5 murdered 20 minutes after she was murdered?

6 A In my opinion, yes, he would want to know.

7 Q Given that that would mean, by definition, either  
8 David Milgaard didn't kill Gail Miller but whoever  
9 assaulted (V4)---- (V4)--- did, or that the jury  
03:47 10 would have to find that there were two different  
11 sexual assaulters roaming around the streets of  
12 Saskatoon that morning if they were to find David  
13 Milgaard murdered Gail Miller; right?

14 A It's a possibility, yes.

03:47 15 Q It's more than that, it's an inevitability, isn't  
16 it, it's one or the other, the theory with David  
17 Milgaard doesn't give him any chance to go and  
18 assault (V4)---- (V4)--- 20 minutes later.

19 COMMISSIONER MacCALLUM: Would you explain  
03:47 20 that to the witness, please?

21 BY MR. LOCKYER:

22 Q Because if you go through all the statements, if  
23 you take the statements of Nichol John and Ron  
24 Wilson as used by the Crown and take the Crown  
03:48 25 theory at trial, sir, David Milgaard couldn't have



1           then gone and have been the assaulter of (V4)----  
2           (V4)--- as well, it would have to have been a  
3           whole different theory.

4           A           But he wasn't accused of any other.

03:48 5           Q           So as defence counsel you would want to know about  
6           the '68 events and the (V4)---- (V4)--- event;  
7           agreed?

8           A           Oh, I think if you are seeking my opinion, yes, of  
9           course a defence counsel would want to know that.

03:48 10          Q           Did you know, sir -- I don't know if it's -- have  
11          you ever known, or if so when did you find out,  
12          that Mr. Milgaard's counsel in 1969, 1970, at  
13          least as far as we know, knew absolutely nothing  
14          about the '68 attacks or the attack on (V4)----  
03:48 15          (V4)---?

16          A           I'm not aware of that.

17          Q           You didn't know that?

18          A           No.

19          Q           Even today?

03:48 20          A           No.

21          Q           Does it surprise you, sir, that that wasn't  
22          disclosed to the defence back in 1969, 1970, the  
23          defence of Mr. Milgaard?

24          A           I recognize that there was somewhat of a different  
03:49 25          approach to sharing of information with defence



1           counsel in those days which I understand is quite  
2           different today.

3           Q       That sort of avoids the question, with respect,  
4           sir. Does it surprise you is really what I'm  
03:49 5           asking you. Perhaps this refers to you were  
6           horrified that the defence of Mr. Milgaard never  
7           knew as to, didn't know about the '68 attacks,  
8           didn't know about the (V4)---- (V4)--- attack.  
9           The Defendant --

03:49 10          A       What --

11          Q       Does that horrify you?

12          A       What are you seeking from me on that?

13          Q       I'm asking you to comment, sir.

14          A       On what is -- please repeat.

03:49 15                    COMMISSIONER MacCALLUM: I think that  
16           avenue has gone far enough. To ask a police  
17           witness questions which should properly be put to  
18           a prosecutor or defence counsel himself is  
19           perhaps beyond the scope of even  
03:50 20           cross-examination.

21           BY MR. LOCKYER:

22          Q       But you didn't know to this day that that was the  
23           case; is that right?

24          A       That's right.

03:50 25          Q       Until I just told you?



1 A That's right.

2 Q Did the police, sir, back in 1969, play, and 1970,  
3 play a role in what the Crown would disclose to  
4 the defence or was it exclusively the decision of  
03:50 5 the Crown?

6 A My opinion would be that the police would not tell  
7 the Crown what to do.

8 Q Would you, in those circumstances, sir, if you had  
9 been aware of that at the time, have maybe said to  
03:50 10 Mr. Caldwell 'don't you think you should pass that  
11 information on to the defence given that I  
12 originally thought, along with others, that the  
13 perpetrator of Gail Miller's murder was likely the  
14 perpetrator of the '68 assaults'?

03:51 15 A My experience in those areas has been that the  
16 Crown has always been very fair. I was always of  
17 the opinion that they approached their duties on  
18 the basis that you don't win or lose a case, it's  
19 just simply a question of presenting the facts to  
03:51 20 assist the courts to make a decision on the guilt  
21 or innocence of a person and I always respected  
22 that approach, and as far as my experience is  
23 concerned, that's the way I always saw those  
24 things in the hands of Crown attorneys.

03:51 25 Q And disclosing relevant facts to the defence?



1 A Well, that was something between the Crown and the  
2 defence counsel. I don't think the police were  
3 ever asked to be a party to that aspect of it.

4 Q Because you felt certainly, you feel now and did  
03:52 5 then, that the '68 offences and the (V4)----  
6 (V4)--- offence were, if nothing else, relevant to  
7 who may have killed Gail Miller?

8 A There's similarity in circumstance, yes.

9 Q If we look, sir, at 147086, please, moving to  
03:52 10 147114, we're going to see Mr. Kujawa's assessment  
11 of what should be disclosed back in 1969 and 1970,  
12 and essentially he says --

13 COMMISSIONER MacCALLUM: Where is this  
14 coming from?

03:52 15 MR. LOCKYER: Sorry, 147114.

16 COMMISSIONER MacCALLUM: I have that, but,  
17 I mean, what is it?

18 MR. LOCKYER: They put the wrong document  
19 up, so I'm just pointing out.

03:52 20 COMMISSIONER MacCALLUM: What's the nature  
21 of the document?

22 MR. LOCKYER: It's the discovery of Mr.  
23 Kujawa, Mr. Commissioner, in --

24 COMMISSIONER MacCALLUM: Thank you.

25 BY MR. LOCKYER:





1 Q I'm sorry, the date, April 22nd and 23rd of '96.  
2 If you go to page -- no, 147114. You see on page  
3 27, sir, of this transcript, question -- well, you  
4 see a question about disclosure, you see that, I  
03:53 5 don't think I need to read it out. You see that  
6 at 109, the question, and then the answer of Mr.  
7 Kujawa:

8 "A The standard of disclosure was to tell  
9 defence counsel everything that was  
03:53 10 relevant to the case."

11 You see that, sir?

12 A Yes.

13 Q A good a summary as one -- as simple and  
14 understandable a summary as one could make, and  
03:53 15 certainly in your view the '68 rapes or sexual  
16 assaults, I'll leave out (V3)-----, and the  
17 (V4)---- (V4)--- assault were, "relevant"; right?

18 A Well, it's a question that I don't think I can  
19 answer, nor should I be asked to answer that  
03:54 20 question.

21 Q I thought you already had.

22 A Well, okay.

23 Q So if we try and recapitulate where we're at so  
24 far, sir, sort of moving into the disclosure of  
03:54 25 pretrial stage which is sort of where I've taken



1 us on the chronology. You follow? That's what  
2 I've been -- I've taken you through the chronology  
3 up to that point in time; right?

4 A I understand.

03:54 5 Q Yes. We've got that on May 16th, or shortly  
6 thereafter, given the (V1)- reference, the police  
7 abandon a theory that they have previously  
8 developed that the perpetrator of the '68 offences  
9 could well be the perpetrator of Gail Miller's  
03:54 10 murder; correct?

11 A Well, I'm not so sure that I would agree as you  
12 have stated it. I think what the police have done  
13 in this situation is on the basis of what they  
14 knew, their efforts have turned to a single  
03:55 15 perpetrator in regards to the Miller murder and  
16 with the intent of either establishing those  
17 points or eliminating those points.

18 Q And they failed to, the police have failed in any  
19 way to document with any direct reference the  
03:55 20 discarding of the 1968 offences as being relevant  
21 to the perpetrator of the Gail Miller homicide;  
22 fair enough, post May 16th? There's no report  
23 saying we've decided that someone different must  
24 have committed the '68 offences?

03:55 25 A Obviously there's no report in that regard.



1 Q The same with (V4)---- (V4)---, there's no report  
2 where the place say we've concluded, because we're  
3 forced to in a sense by the conclusion that  
4 Milgaard killed Gail Miller, we've concluded that  
03:56 5 someone different may have -- must have, rather,  
6 assaulted (V4)---- (V4)---; right? That's not in  
7 a police report, it's not documented as such?

8 A No. I'm not aware if it is.

9 Q Right. And as well from what I've told you,  
03:56 10 defence counsel conducted David Milgaard's defence  
11 without knowledge of the '68 offences or the  
12 offence 20 minutes after Gail Miller's murder,  
13 that's where we got to.

14 A I've already indicated that I don't know that  
03:56 15 information.

16 Q Now that brings us to the next stage of the  
17 chronology, if I can put it that way, sir, and  
18 that's the (V5)-- (V5)--- rape on February the  
19 21st of 1970. Now, she, in very short, was raped  
03:56 20 in an alleyway again in the same area as where  
21 Gail Miller, (V1)--- (V1)- and (V2) (V2)-  
22 (V2)----- were raped; right?

23 A I don't know too much about --

24 Q Well, were you involved in the (V5)--- case?

03:57 25 A No.



1 Q Actually, you were, you were the ident man it  
2 seems on the (V5)--- case, sir. If we look at  
3 056325, you see, sir, there that you are writing a  
4 letter to detective, is it Kerr, the officer in  
03:57 5 charge, signed by you, Penkala, re: alleged rape,  
6 (V5)-- (V5)--- complaint. Do you see that?

7 A Yes, I see that, and I also explained before that  
8 I was asked to provide the direction, but not  
9 necessarily be involved in the actual. What  
03:57 10 happened is investigators would approach me and  
11 ask me to prepare a direction in regards to  
12 exhibits and evidence that they had.

13 Q The ident guy pulls the exhibits together at a  
14 minimum, doesn't he, sir, and collects them from  
03:58 15 the scene and pulls them together and then submits  
16 them to the --

17 A Not in all cases.

18 Q You mean you have one ident person who gets the  
19 exhibits from the scene and then another ident  
03:58 20 person who sends them in? That's a bit weird.

21 A No. What I've been telling you is that I prepared  
22 the direction to the laboratory on the advice of  
23 an investigator and I'm not sure whether it was an  
24 ident man -- and I can't make out the --

03:58 25 Q Can we enlarge this so we can see it? You are



1 right, it's hard to read, I agree with you, it's  
2 very hard to read. Okay, hair found on the ground  
3 it looks like. If anyone can help me, please do.  
4 Controlled samples of head hair of (V5)-- (V5)---,  
03:58 5 controlled samples of pubic hair of (V5)--  
6 (V5)---, controlled sample of head hairs of Barry  
7 Roy Glasson. Oh, okay. Hair found on the ground  
8 at the scene --

9 MR. HODSON: We can bring it up a bit.

10 BY MR. LOCKYER:

11 Q I can read it now, it's great now. To conduct  
12 examination of Exhibit A to determine if there are  
13 characteristics to identify and associate with  
14 controlled samples in exhibits B, C, and D. Now,  
03:59 15 those exhibits would surely have been collected by  
16 ident; would they not?

17 A No, not necessarily.

18 Q You mean ordinary police officers would be  
19 collecting hair on the ground at the scene of a  
03:59 20 rape, they wouldn't call ident in to do that?

21 A Well, they could, but it could also just be the  
22 investigator that's out there. I have no  
23 background on this other than the fact that I  
24 authored the letter seeking the, and providing the  
03:59 25 direction to the lab, probably at the request of



1 the investigator, and I think if the occurrence  
2 report was examined along with this, I think that  
3 would be self-explanatory.

4 Q I can't bring that up. I do know there's a  
04:00 5 second, third and fourth page of this document.  
6 Can we go to the next page, please? They were  
7 completely illegible in the copy I had, Mr.  
8 Commissioner, so I would be interested to see how  
9 they look now. Does this document have a second  
04:00 10 page? If you go back to the number I gave you,  
11 the document had a second page, third page and  
12 fourth page, which was 056325. Here we are,  
13 056326, if we can enlarge that. I found this  
14 almost impossible to read as well, a lot of it is,  
04:00 15 but what we do have is details of action taken,  
16 right, and you would have drafted this, sir,  
17 presumably would you? Oh no, I don't think you  
18 would have, this is a report by a chap with a dog  
19 I think on February the 21st, '70, instructions  
04:01 20 were to proceed to an address of the alleged rape.  
21 Sorry, are you --

22 MR. HODSON: Mr. Lockyer, if you wanted the  
23 occurrence report, 056265 identifies the  
24 identification officer.

04:01 25 MR. LOCKYER: As?



1 MR. HODSON: As Simpson.

2 MR. LOCKYER: Okay.

3 MR. HODSON: As Simpson on the (V5)--  
4 (V5)--- --

04:01 5 MR. LOCKYER: Can I finish this document  
6 before we skip?

7 MR. HODSON: Sure.

8 BY MR. LOCKYER:

9 Q Can we go to the next page of this document,  
04:01 10 please, I think it has four pages, and could you  
11 enlarge it, the lower part I guess more than  
12 anything. That's a report of the hair and fibre  
13 section, sir. Logically it would be addressed to  
14 you since you sent in the exhibits in the first  
04:02 15 place. Is that right?

16 A Well, technically it's addressed to the file.

17 Q All right. I can't tell if your name is on here  
18 because it's just -- it does say the chief of  
19 police, I can see that, but that's the report on  
04:02 20 your submission; is that right, sir, it would  
21 seem?

22 A Well, I have no way of knowing and I can't make  
23 out the --

24 Q Well, you had sent in hairs and it's a report of  
04:02 25 the hair and fibre section and it's all part of



1 the same document.

2 A No, I didn't send them in, I prepared the  
3 instructions in the letter to the officer in  
4 charge of the Crime Detection Laboratory.

04:02 5 Q All right, you prepared the submission; is that  
6 right?

7 A No, I prepared the draft of the directions that  
8 were being sought.

9 Q You signed a letter --

04:02 10 A And some officer would obviously take those  
11 exhibits to the lab. My involvement would just  
12 simply be drafting the letter, that was the  
13 process that was adopted, and it always fell upon  
14 the officer in charge of the ident section to  
04:03 15 prepare those directions.

16 Q Was Simpson a part of your section?

17 A Yes.

18 Q So your -- how many were in your section?

19 A I think there were five people.

04:03 20 Q So you were a pretty small, cohesive unit  
21 presumably; is that fair?

22 A Yes, yes.

23 Q All right. If we go to the next page, last page  
24 of this document, and that's just a continuation,  
04:03 25 as you can see, of the hair and fibre report on





1 the (V5)-- (V5)--- case. You see that, sir?

2 Don't ask me to read it, but you can see what it  
3 is; right?

04:03 4 A Well, I can't read it because I can't -- I can't  
5 make it out.

6 Q It's page 2 of their report, page 1 being the  
7 previous page. So despite the fact that your  
8 signature certainly appears on a document that you  
9 say you prepared, you didn't know, you knew very  
04:04 10 little about the (V5)-- (V5)--- case; is that  
11 right?

12 A That's right.

13 Q And did it occur to you, sir, since you had been  
14 involved in the (V2)-----, (V1)- and (V3)-----  
04:04 15 cases, you had knowledge of them at the very least  
16 and had been involved in two of them directly;  
17 right?

18 A Only by knowledge as a result of the Miller  
19 investigation.

04:04 20 Q Right. Did no one bring to your attention that  
21 here was yet another case that seemed to fit the  
22 pattern of the 1968 assaults?

23 A No, and that's, and that's not hard to understand,  
24 because I was not the coordinator of the  
04:06 25 investigations.



1 Q But you have told us, sir, that as far as you  
2 know, as far as you can remember, this was the  
3 only case of a serial rapist in Saskatoon in your  
4 career, and yet somehow you know about the three  
04:07 5 but you don't know about the fourth?

6 A Umm, there's an assumption that I was involved in  
7 every effort. That is just simply not true. I, I  
8 had duties that exceeded, exceeded this particular  
9 case. I attended --

04:07 10 Q No doubt.

11 A -- three murders and an attempted murder in 1969.

12 Q I have no doubt you had other cases, sir, I don't  
13 doubt that for a minute. But --

14 A Well I don't understand what it is that you are  
04:07 15 trying to obtain from me.

16 Q Just that I would have thought that, if this is  
17 the only time in your entire career that you ran  
18 into a serial rapist apparently at large in the  
19 City of Saskatoon, you, and indeed all your  
04:07 20 colleagues, wouldn't be very conscious of it at  
21 work, and linking the cases, and trying to find  
22 the perpetrator?

23 A But when I wasn't the coordinator in regards to  
24 any of these issues, and I had my own  
04:08 25 responsibilities, there were other people that



1 would attend to that.

2 Q Well who? Who?

3 A Even though I was knowledgeable that there was a  
4 rapist in our city.

04:08 5 Q Who should have put these all together, sir, who  
6 do I go to, who do I question about it?

7 A I --

8 COMMISSIONER MacCALLUM: Just a minute.

9 The last thing he said was 'who?'

04:08 10 A Well there was an assigned coordinator to the  
11 Miller murder, and I think it would be deputy  
12 chief -- or Detective Sergeant Mackie.

13 BY MR. LOCKYER:

14 Q Well I'm in February 21st, 1970, now, we're a  
04:08 15 month after David Milgaard has been convicted of  
16 Gail Miller's murder.

17 A Okay, so we're talking about an entirely different  
18 case, you are talking about another rape case; is  
19 that --

04:08 20 Q Yes, another case that fits the pattern of what  
21 was going on in 1968.

22 A Yeah.

23 Q That's right. Who should I go to to say 'why  
24 wasn't the link made' or 'was it made'?

04:09 25 A Well I don't know who you would go to. The mere



1 fact that this happened after, after the January  
2 31st, 1969 Miller murder and we had, as I  
3 understand and my general knowledge is, we had no  
4 one to connect with the previous rapes, and I  
04:09 5 don't know what the situation is in the case that  
6 you are presenting at the moment for February of  
7 1970.

8 Q Well by February 21st, 1970 I would assume that  
9 the Gail Miller murder has come out of the  
04:09 10 equation but you have still got your three  
11 unsolved sexual assaults in 1968 and then a  
12 copycat in February of 1970.

13 A Yes.

14 Q But I don't know, and I'm trying to find out, if a  
04:09 15 link was made at the time? You had --

16 A Well I --

17 Q You had some limited involvement in the (V5)--  
18 (V5)--- crime; did you say to yourself 'hold it,  
19 this takes me back to that serial rapist we never  
04:10 20 caught back in 1968'?

21 A This is a bit exasperating.

22 Q Did that happen?

23 A This is a bit exasperating because, as I have said  
24 before, you have a morality section, you have a  
04:10 25 detective section, you have an identification



1 section.

2 Q All right.

3 A They all have responsibilities, and my  
4 responsibility in identification would be in  
04:10 5 regards to scene attendance and the service  
6 assistance to these other two departments, and  
7 also includes the patrol division because some of  
8 these cases are handled by the patrol division.  
9 So one has to accept the fact that we were a  
04:10 10 service unit to all of the investigators within  
11 the police service.

12 Q When you became police chief, sir, who do I -- who  
13 should have made these links? You, surely, would  
14 know the answer to that?

04:10 15 A The coordinators that were assigned the particular  
16 files.

17 Q All right. But if, if the coordinator of one of  
18 them is Smith and the coordinator of another is  
19 Jones, how do they get together, how do they put  
04:11 20 them together?

21 A Well --

22 Q If you see what I mean?

23 A Well, the coordinator, that's the responsibility  
24 of the coordinator. He is to review all the  
04:11 25 information that comes to that particular and



1 relative to that particular complaint, and then he  
2 does the appropriate thing in directing  
3 investigations, and -- and -- and providing  
4 information and direction to his, to his  
04:11 5 operational people.

6 Q Well the best I can tell, sir, as to when some  
7 links started to be made between (V5)--- and the  
8 1968 offences was really by as a result of what  
9 Fisher told the police in Winnipeg that led to  
04:11 10 Karst going out to see him in Winnipeg and taking  
11 confessions to him to the (V5)--- assault and the  
12 (V3)----- assault. All right?

13 A I'm generally be -- I'm generally aware of that,  
14 but --

04:12 15 Q Right. So we have now got, if we hadn't got one  
16 before, we've now got a link between (V5)--- and  
17 (V3)----- which, in a sense, means it looks like  
18 we're going to have a link between  
19 (V5)---/(V3)-----/(V1)- and (V2)-----; would you  
04:12 20 agree?

21 A Yes.

22 Q Yes? All right. And indeed, if we look at the  
23 March 17th, '71 letter that was written to --  
24 written by or on behalf of Kettles, 261053, I'm  
04:12 25 looking particularly at 261055, that's the March



1 17th letter, sir, to the Crown solicitor, Deputy  
2 Attorney General if you like, written on behalf of  
3 Kettles; you see that, deputy chief wrote it in  
4 fact?

04:13 5 A Yes.

6 Q And you will see that in that letter, page 3:

7 "During October 22, 1970, Members of our  
8 Force interviewed Fisher while he was  
9 confined to cells at the Fort Garry,  
04:13 10 Manitoba, Police Station. Fisher  
11 admitted being responsible for the rape  
12 of (V5)-- (V5)----- (V5)--- on February  
13 21, 1970, and also the attempted rape of  
14 (V3)-- (V3) (V3)----- on November 29,  
04:13 15 1968. Fisher was questioned about the  
16 offences committed on October 21 and  
17 November 13, 1968, and denied any  
18 knowledge of same.

19 Police investigation revealed  
04:13 20 that Fisher lived within a block of the  
21 locations where these rapes occurred,  
22 the description of the culprit is very  
23 similar and the modus operandi is the  
24 same in all four cases. Fisher claims  
25 that he had never heard of these



1 offences being committed, which is hard  
2 to believe as they happened within a  
3 three week period in the same area and  
4 received wide publicity.

5 (V5)---, (V1)- and (V2)-----  
6 were examined by their family doctors  
7 and in each case the doctors reported  
8 finding evidence consistent with rape."

9 So we there have -- if we can leave it there,  
04:14 10 please -- we there have, in essence, a conclusion  
11 by the chief, or the deputy chief on his behalf,  
12 presumably as a result of what officers in charge  
13 of these cases have told them; right?

14 A Yes.

04:14 15 Q That Fisher, if he committed (V5)--- and committed  
16 (V3)-----, surely committed (V1)- and (V2)-----  
17 despite his denials of them; right?

18 A That's what he is suggesting, yes.

19 Q Which is implicitly an acknowledgment that Fisher  
04:14 20 will lie about whether he has committed particular  
21 crimes; agreed?

22 A Of course.

23 Q Yes. Because they are saying, there, you have got  
24 the chief of police in effect saying 'Fisher is  
04:14 25 lying when he says he didn't rape (V1)--- (V1)-





1 and when he says he didn't rape (V2) (V2)-  
2 (V2)-----'; correct?

3 A It would appear that way.

4 Q Yes. Now you could well put in, sir, into that  
04:15 5 paragraph:

6 "Police investigation revealed that  
7 Fisher lived within a block of the  
8 locations where these rapes occurred  
9 ...",

04:15 10 not actually true in the case of (V3)-----, he  
11 worked within a block as opposed to live, but  
12 anyway:

13 "... the description of the culprit is  
14 very similar and the modus operandi is  
04:15 15 the same in all four cases.",  
16 you could easily say there '... in all five  
17 cases.'; couldn't you?

18 A As an assumption, yes.

19 Q Yeah, Gail Miller being number five?

20 A Yes.

21 Q You could actually say '... in all six cases.',  
22 couldn't you, if you would bring in (V4)----  
23 (V4)---?

24 A That's, logically, that would be --

04:15 25 Q That would be a perfectly reasonable statement to



1 have said here 'Police investigation revealed that  
2 Fisher lived within a block of the locations where  
3 these rapes occurred, the description of the  
4 culprit is very similar and the modus operandi is  
04:15 5 the same in all six cases.' It would be a  
6 reasonable statement as a generalization; wouldn't  
7 it?

8 A As a generalization, yes.

9 Q Yes. And then the fact that Fisher hasn't  
04:16 10 admitted Gail Miller and hasn't admitted (V4)----  
11 (V4)--- is really of no consequence given, at  
12 least in the opinion of the author of the letter,  
13 given that he has, in the opinion of the author of  
14 the letter, falsely denied the rapes of  
04:16 15 Ms. (V3)----- and Ms. (V1)-? You see my point?

16 A Yes.

17 Q And the questioning of Fisher, sir, of Mr. Fisher  
18 that took place on October 22nd, 1970 which led in  
19 part to this letter, so it really did lead to this  
04:16 20 letter six months later, right, this March '71  
21 letter?

22 A I have no knowledge concerning, concerning the --  
23 other than general knowledge --

24 Q Right?

04:17 25 A -- because of being --



1 Q But the questioning of -- you know that Fisher  
2 confessed, if only from his letter, to the two  
3 crimes that he confessed to in Saskatoon? He did  
4 that on October 22nd, 1970, for your  
04:17 5 information, --

6 A Okay.

7 Q -- and he did it to Detective Karst who was one of  
8 the investigators in the Gail Miller murder. You  
9 see?

04:17 10 A Yes.

11 Q So do you see, sir, one of the things that -- and  
12 this is perhaps a little basic -- but one of the  
13 things that police officers operate on, courts  
14 operate on in determining whether an event  
04:17 15 happened or not, is simple circumstantial  
16 evidence. You are obviously familiar with the  
17 concept of circumstantial evidence; are you not?

18 A Yes.

19 Q But you see, sir, how, as we go along, there seems  
04:17 20 to be a little bit of a circumstantial case  
21 building up that maybe someone in the Saskatoon  
22 Police Force didn't want anyone to know about the  
23 rapes that Larry Fisher committed?

24 A I --

04:18 25 Q Are you beginning to see my point, sir?



1 A I can't, I can't accept that suggestion.

2 Q Uh-huh?

3 A I really can't.

4 Q Because despite all this, sir, despite the fact  
04:18 5 that you have now -- 'you' meaning the Saskatoon  
6 Police Service -- have now apprehended the person  
7 as far as you can remember is the only serial  
8 rapist who committed serial rapes in Saskatoon  
9 during your whole career, right, --

04:18 10 A And you are speaking of Fisher?

11 Q -- you -- yes -- you never heard about it? That's  
12 your evidence, isn't it, you didn't know?

13 A That, that's true.

14 Q You don't find that extraordinary?

04:18 15 A Well it -- not in my circumstance --

16 Q Okay.

17 A -- because I had -- I have different, I had  
18 different assignment, my assignments were somewhat  
19 different. If I were involved in the rape cases  
04:19 20 specifically, obviously I would, I would have  
21 known about it. I was not involved.

22 Q You said yesterday, sir, as a part of one of the  
23 answers to Commission Counsel's question, that the  
24 reason you can say there was no conspiracy of  
04:19 25 silence around the Fisher rapes was because you



1 would have heard something on the grapevine if  
2 there had been; do you remember saying that?

3 A I said something to that effect, yes.

4 Q You didn't hear anything on that grapevine about  
04:19 5 the arrest of the only serial rapist in your  
6 career from the Saskatoon area, you didn't hear  
7 anything about that on the grapevine it seems  
8 either?

9 A No, I didn't, --

04:19 10 Q Right.

11 A -- until way on into -- I think I was already  
12 retired.

13 Q That's not something you might expect to get on  
14 the grapevine, sir? It's second only to homicide,  
04:19 15 surely, a serial rapist? What's worse, what could  
16 be worse except a homicide?

17 A Well, no disagreement on that, that's for sure.

18 Q And as well, sir, we also know that Mr. Caldwell,  
19 who prosecuted David Milgaard at his trial, also  
04:20 20 knew of the Fisher confessions. Could we look at  
21 150576, please, and you will see this is a  
22 document, sir, I -- do we know whose handwriting  
23 this is, may I ask? We don't know? So if we can  
24 just read it, sir, you will see:

04:20 25 "acknowledge your letter of March



1 24/71",

2 I'm sorry, I can't produce the letter, sir:

3 "It was stated in our letter of March  
4 18/71, ...",

04:20 5 which is the letter I have just shown you:

6 "... we are prepared to dispose of the  
7 charges in Saskatoon outstanding against  
8 your client ...",

9 so it's addressed to Mr. Fisher's lawyer:

04:21 10 "... with the least possible delay once  
11 the charges in Manitoba have been  
12 disposed of.

13 Since the offences occurred in  
14 Saskatoon, it would seem that our agent,  
04:21 15 T.D.R. Caldwell, will be attending to  
16 the matter."

17 And I think the document has a second page, I  
18 think that's the end of that page, and the second  
19 page simply says:

04:21 20 "Mr. Meldrum would like this looked into  
21 tomorrow".

22 You see that, sir?

23 A Yes.

24 Q And then if we look at 261053, please, we're back  
04:21 25 now to the same letter we saw before, sir, where I



1           turned the four rapes into the six. Do you  
2           remember the last paragraph or second-to-last  
3           paragraph of the letter, we just did it a few  
4           minutes ago?

04:21 5           A           Yes.

6           Q           Now the beginning of the letter, sir, if we can  
7           look at the beginning of the letter you will see  
8           that this is the letter written on behalf of the  
9           deputy on behalf of Chief Kettles:

04:22 10                   "Dear sir:"

11                   "Re: Larry ... Fisher"

12                   "During March 16, 1971, I was contacted  
13                   by Mr. T.D.R. Caldwell, Agent of the  
14                   Attorney General, who requested that I  
04:22 15                   forward to you a summary of the facts  
16                   relating to offences of rape allegedly  
17                   committed by the above-named."

18           So we now know that the prosecutor of David  
19           Milgaard who, if precedent is anything to go by,  
04:22 20           would have had the police reports taking us back  
21           into the '68 sexual offences and the (V4)----  
22           (V4)--- offence on January 31st, 1969, is, a year  
23           and a bit later, contacting someone about a  
24           summary of those -- or of at least one of those  
04:22 25           very charges, the (V3)----- charge; do you see



1           that?

2           A           I see that, yes.

3           Q           And then two others, because it's also talked  
4                    about in the same letter, the (V1)- -- indeed, if  
04:22 5                    you look right below what you are looking at you  
6                    can see (V2)----- and (V1)- as numbers (1) and (2)  
7                    right there; you see that?

8           A           I see that, yes.

9                    MS. KNOX: Mr. Commissioner, before the  
04:23 10                   witness answers the question, if I may. With  
11                    respect to the two documents the witness is being  
12                    referred to, there's nothing in them that causes  
13                    one to conclusively know, as Mr. Lockyer would  
14                    put it, that Mr. Caldwell knew the facts of this  
04:23 15                    case.

16                            One is somebody writing to say  
17                            that, because he is the agent in Saskatoon, he  
18                            will be looking after the matter. He is the  
19                            agent in Saskatoon, it doesn't say he has been  
20                            contacted, that anybody has discussed it with  
21                            him, or they have any knowledge he has to the  
22                            file.

23                            With respect to the second  
24                            letter, all it simply does is says that  
04:23 25                            Mr. Caldwell asked somebody else to provide a





1 summary of the information, which, if we want to  
2 look at the other side of that, we could easily  
3 ask 'well if he had the information, he knew it,  
4 why would he have to ask somebody else to send it  
04:23 5 to the office in Regina'.

6 So to make the definitive  
7 statement that he knew based on these documents,  
8 I would suggest, is a far leap from what the  
9 documents would suggest.

04:23 10 COMMISSIONER MacCALLUM: Well I must say,  
11 Ms. Knox, there has been no such conclusion in my  
12 own mind as a result of the examination of this  
13 witness on matters which he knows nothing about.  
14 I can't understand, really, why questions are  
04:24 15 being put to him about what Caldwell might have  
16 known.

17 MR. LOCKYER: Oh well, Mr. Commissioner, I  
18 must explain that. I really have to deal with  
19 that. This witness is a combination of a witness  
04:24 20 involved in the case and systemic witness.

21 COMMISSIONER MacCALLUM: Yes.

22 MR. LOCKYER: He subsequently became chief  
23 of police. He was asked by Commission Counsel  
24 if, in his view, there was any attempt to conceal  
04:24 25 the rapes that Mr. Fisher committed from the



1 world at large, meaning from Mr. Milgaard and his  
2 counsel, --

3 COMMISSIONER MacCALLUM: Yes?

4 MR. LOCKYER: -- and I'm trying to  
04:24 5 demonstrate to him that given the people who  
6 knew, given their role in the various respective  
7 cases, including the prosecution of David  
8 Milgaard, the circumstantial evidence, I would  
9 submit, suggests that there certainly was an  
04:24 10 attempt to conceal those offences from David  
11 Milgaard's defence team.

12 COMMISSIONER MacCALLUM: Could I see the  
13 top of that letter, please, who it's to? I  
14 missed that. So this is a letter --

04:25 15 MR. LOCKYER: To the Deputy Attorney  
16 General written by, on behalf of the chief of  
17 police, advising that he:

18 "... was contacted by Mr. ... Caldwell  
19 ... who requested ... I forward to you a  
04:25 20 summary of the facts relating to  
21 offences of rape allegedly committed by  
22 the above-named."

23 COMMISSIONER MacCALLUM: Yes, I see. I  
24 understand what you are talking about but I'm  
04:25 25 concerned about the fairness of putting questions



1           like this to the witness. He said that he was  
2           not aware of any cover-up, how would he be aware,  
3           how could you -- I mean he has said that --

04:25 4           MR. LOCKYER: And I'm suggesting to him --  
5           sorry?

6           COMMISSIONER MacCALLUM: How could it be  
7           that what you are now showing him demonstrates  
8           that he should have been aware?

04:25 9           MR. LOCKYER: No, I'm suggesting to him  
10          that there was such a cover-up, and if there was  
11          I would then ask you, Mr. Commissioner, to  
12          conclude that this witness, as chief of police,  
13          might well have known about it.

14          MS. KNOX: Mr. Commissioner?

04:26 15          MR. LOCKYER: But I have to get there  
16          first.

17          COMMISSIONER MacCALLUM: Uh-huh.

18          MS. KNOX: If I may, in terms of where  
19          Mr. Lockyer wants to go; number 1, when he was  
04:26 20          just responding to the statement that I made he  
21          said 'given', he uses the phrase 'given the  
22          people who knew'. He may believe they knew but  
23          there's not evidence before this Commission at  
24          this point in time that Mr. Caldwell knew this  
04:26 25          information, there is no evidence before the



1 Commission in this regard, and while Mr. Lockyer  
2 may want to go there we have to be bound by what  
3 is the evidence and what -- not what he believes  
4 because that is his particular take on this  
04:26 5 situation.

6 And I say to you again, there  
7 is nothing in this document and the document that  
8 he showed the witness before this that could  
9 cause or support his contention that, therefore,  
04:26 10 former chief Penkala should conclude that  
11 Mr. Caldwell knew.

12 MR. LOCKYER: I think there's every reason  
13 to ask you, Mr. Commissioner, to conclude that  
14 there's -- it's a reasonable inference to draw  
04:27 15 from these two documents. I mean with -- this  
16 second document is the chief of police saying it,  
17 it seems to me.

18 COMMISSIONER MacCALLUM: It's okay.

19 MS. KNOX: Thank you.

04:27 20 MR. LOCKYER: In any event, if I --

21 COMMISSIONER MacCALLUM: Just, we have  
22 argued our ways to within five minutes of  
23 quitting time, so I'll call the adjournment at  
24 this moment and we'll revisit the matter tomorrow  
04:27 25 morning. In the meantime, perhaps I'll take



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another look at the documents.

*(Adjourned at 4:27 p.m.)*





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